(21,234.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 182.

HUTCHINSON, PIERCE & CO., APPELLANT,

vs.

JOSEPH LOEWY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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3189.

United States Circuit Court of Appeals for the Second Circuit.

HUTCHINSON, PIERCE & COMPANY, Complainants-Appellants,
vs.
JOSEPH LOEWY, Defendant-Appellee.

TRANSCRIPT OF RECORD.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Printed under the direction of the clerk.

1 *Bill of Complaint.*

(Filed May 14, 1906.)

Circuit Court of the United States for the Southern District of New York. In Equity.

To the Honorable the Judges of the Circuit Court of the United States for the Southern District of New York, Sitting as a Court of Equity:

Hutchinson, Pierce & Co., a corporation organized and existing under and by virtue of the laws of the State of New York and having its principal place of business in the City of New York, in said State, brings this its bill of complaint against Joseph Loewy, of the City of New York, in the State of New York, an inhabitant of the Southern District of New York, carrying on business under the name J. Loewy & Co., in said City of New York, and hereinafter designated the Defendant.

And thereupon your orator complains and says that it is engaged in the business of manufacturing and selling shirts, waists, underwear and furnishings and that its said business was founded in or about the year 1840, and that from the year 1840 to the present time it has been a continuing business and is now a business of large proportions which has long been and continues to be a source of profit to those conducting it and of benefit and advantage to the public.

Your orator says that its said business of manufacturing
2 and selling shirts, waists, underwear and furnishings now by it carried on has been a continuous business, owned, conducted and carried on successively by T. A. Morison & Hoyt and their successors, Morison, Son & Hoyt, and their successors, Morison, Son & Hutchinson, and their successors, Morison & Hutchinson, with a continuous and unbroken reputation and good-will, which were perpetuated, preserved and transferred from the establishment of said business in or about the year 1840 until in or about the year

1883, when the then owners of the business duly assigned, transferred and made over all their right, title and interest in the business to the firm consisting of Gardner S. Hutchinson, Henry B. Pierce, Ira Cole, and Thomas S. Morison, co-partners doing business under the firm-name Hutchinson, Pierce & Co., and the said firm, although it changed as to its membership by reason of death and withdrawals and the addition of new partners from time to time, was a continuous firm under the name Hutchinson, Pierce & Co., and the business was continuously and uninterruptedly owned and carried on by said firm of Hutchinson, Pierce & Co. from in or about the year 1883 until the business and the rights, all and singular, pertaining to said business and the good-will thereof and the trade-marks, trade-names, designations and indicia belonging or appertaining thereto, including the trade-mark hereinafter referred to, were duly transferred in the year 1895 to your orator, a corporation duly organized under the laws of the State of New York, which became in all things the owner and proprietor of said business and of all the assets of said firm of Hutchinson, Pierce & Co., and of its predecessors, all and singular, before mentioned, the same, all and singular, having been by your orator's said immediate predecessors to it fully conveyed, transferred and assigned.

And your orator says that its said business, to which it succeeded in the year 1895 as aforesaid, has been continuously carried on without interruption for over sixty years by your orators and its
3 predecessors and that all the property and business assets formerly owned by said firm, Hutchinson, Pierce & Co., and the firms and individuals to whom it succeeded, including the mechanical appliances, stock in trade, good-will, trade-marks, trade-names, and all property, legal and equitable, of said firms and individuals, are now the property of your orator in the possession, ownership and advantages of which your orator is entitled to be protected at law and in equity.

And your orator says that in the year 1883 said firm, Hutchison, Pierce & Co., succeeded to said business of manufacturing shirts, waists, underwear and furnishings and to the exclusive right to use in connection therewith as a trade-mark and trade-name to designate and indicate and identify the origin and genuineness of the same the arbitrary mark, symbol or designation "Star," which had been continuously for many years used and availed of as a trade-mark and trade-name by the predecessors in business of said firm of Hutchinson, Pierce & Co., and which continued to be used by said firm, Hutchinson, Pierce & Co., until your orator acquired the business, as hereinbefore set forth, and which has by your orator been continuously used and is now in use according to law as your orator's trade-mark and trade-name by it availed of to denote the shirts, waists, underwear and furnishings of its production.

Your orator shows unto your Honors that the use of the symbol of a star and the equivalent expression "Star" were original with your orator's predecessors; that is to say, your orator's predecessors were the first to make use of the symbol of a star as a mark or designation and the first to use the designation "Star" in connection with

shirts, waists, underwear or furnishings and the first to symbolize the expression "Star" by means of the word "Star" or the symbol of a star, or both the word and symbol, and that prior to the purchase and acquisition of said business by said firm of Hutchinson, Pierce & Co. in 1883, as aforesaid, the word "Star" and the symbol
4 of a star in connection with shirts had been continuously used for many years by the predecessors in business of said firm as a trade-mark and trade-name to denote the origin and genuineness of the shirts in said business produced by being marked upon each of the shirts manufactured by the predecessors in business of said firm in a prominent and conspicuous place thereon and in or upon pictures and drawings of said shirts used and availed of as advertisements, and otherwise, and on boxes, signs, packages and circulars issued by the predecessors in business of said firm and used in said business, and that long prior to the acquisition of said business by the said firm of Hutchinson, Pierce & Co. in 1883 the shirts in said business produced were well and widely known to the trade and public and were identified as the true and genuine products of said business by means of said trade-mark and were designated, asked for, bought and sold as "Star" shirts and by the representation or figure of a star, which shirts had for years been and continue to be extensively advertised at great expense through the newspapers, periodicals, circulars and in a multiplicity of other ways by means of said trade-mark and were in great demand under said designation and trade-mark, and when your orator's immediate predecessor, the said firm of Hutchinson, Pierce & Co., acquired the business, it was conducted and carried on substantially as it had been theretofore carried on, including the use of said symbol and designation "Star" as a trade-mark and trade-name for the shirts, waists, underwear and furnishings therein produced, except that the business was increased in magnitude and the popularization of said trade-mark and trade-name "Star" were greatly enlarged and extended.

Your orator further shows that since it acquired the business as aforesaid in the year 1895, it has continued without interruption to make use of the symbol of a star and the designation "Star" substantially as the same were used by its predecessors in connec-
5 tion with the shirts in said business produced and your orator continued at great expense extensively to advertise said shirts by means of said trade-mark through the newspapers, periodicals, by circulars and travellers, and in a multiplicity of other ways, and that said shirts continued to be sought after and sold in large quantities and identified as the true and genuine product of said business by means of said trade-mark, and in consequence of such advertising and publicity and of the merits of said shirts and other articles they continued to be and are now very popular and in great demand.

And your orator further says that for a period of more than fifty years, as well as prior thereto, said trade-mark "Star" expressed by the symbol or word, has been by your orator and its predecessors continuously and notoriously used and availed of as the mark and name under which its shirts have been marketed and sold and that each shirt of its production has for more than fifty years had applied

and affixed thereto the said trade-mark in the form of a symbol of a star or the word "Star" or both the symbol and equivalent word, as a distinctive mark of authenticity for the purpose of indicating the origin and genuineness of the article and to differentiate it from similar articles made by others, and the shirts of your orator and its predecessors in business have for more than fifty years been continuously known, identified, referred to, asked for, ordered and sold as "Star" shirts or by the symbol of a star, and the said trade-mark and trade-name "Star" in connection with shirts has continuously been widely and generally known and used throughout the markets of the United States and elsewhere by the trade and purchasers as a distinctive mark of authenticity to denote and identify the product of your orator's business and has had among the trade and with the public for more than fifty years an established and recognized meaning as indicating the shirts of your orator and them alone, for which a large demand has been created.

6 And your orator further says that its predecessors, said firm of Hutchinson, Pierce & Co., formally established its exclusive right to the exclusive use of the symbol of a star and of the equivalent word or expression "Star" as a trade-mark and trade-name for shirts in a number of suits in the Courts of the United States and in other Courts and that a number of Final Decrees have been entered in which the right of your orator's said predecessor to the exclusive use of said trade-mark "Star" was judicially ascertained and established. And your orator refers particularly to a certain suit which was instituted in the Circuit Court of the United States for the Northern District of Illinois in the year 1889, in which your orator's immediate predecessor, said firm of Hutchinson, Pierce & Co., were complainants and Jacob F. Blumberg was defendant, and in which, after a vigorous defense, a Final Decree was entered, by which Decree and the opinion of the Court handed down in connection therewith it was, after full investigation and deliberation, held that complainant's predecessors adopted the "Star" both in word and symbol as their trade-mark as early as 1859, which had been continuously used by the successive owners of the business upon the goods produced therein, so that "Star Goods" had come to be the common designation of the goods of said firm, which were called for and referred to as "Star" shirt or "Star" waist as the case might be, and that the use by the defendant of a star, although of a different number of points and combined with a crescent, was inequitable and should be enjoined, with an accounting, all as will more fully appear by the records of said Court or a duly authenticated copy thereof in this Court to be produced and to your Honors exhibited.

And your orator shows that since the decision of said suit, as well as theretofore, the goods of the production of your orator and its predecessors have been continuously known, identified and sold by

7 means of its said trade-mark "Star," which has been recognized and respected as your orator's trade-mark and trade name (except in a few instances where an imitation of said trade-mark has been availed of without your orator's consent, in all

which instances the use has been promptly discontinued on demand or suppressed and enjoined by legal proceedings) and as such has been in general use by the trade and public as meaning and denoting only your orator's products and as guaranteeing their origin and genuineness.

And your orator avers that by reason of the premises and the priority of adoption and long, continuous, exclusive and notorious use of the conception "Star," expressed by symbol or word, or both, in connection with its products and by reason of the meaning everywhere recognized and understood of said trade-mark "Star" when applied to shirts as guaranteeing the origin and genuineness of said shirts as being your orator's production, your orator is entitled to be protected in its exclusive use and against any and every use of the symbol of a star or the word "Star" (alone or in combination with other words or symbols) in connection with any shirt not of its production and particularly against the acts of the defendant hereinafter described.

Your orator further shows unto your Honors that its said trade-mark has been for many years, and more than fifty years, used by your orator and its predecessors in commerce among the several States of the United States and in commerce with foreign nations and that your orator, being the owner of said trade-mark, caused its said trade-mark thus by it owned to be duly registered as its trade-mark in the Patent Office of the United States, at Washington, District of Columbia, on the Third day of April, 1906, in accordance with the Act of Congress in such cases made and provided, as will more fully and at large appear by a certain certificate of registration numbered 51,146 to your orator issued in pursuance of the Act of Congress in such cases made and provided or a duly authenticated copy thereof in Court to be produced and to your Honors exhibited.

8 Your orator shows unto your Honors, on information and belief, that, with full knowledge of the premises and of the reputation of your orator's shirts and of the demand existing for the same and the use and meaning of your orator's said trade-mark consisting of the representation of a star or the word "Star" as indicating and identifying the origin and genuineness of your orator's shirts, Joseph Loewy, of the City of New York, in the State of New York, meaning and intending to divert and secure to himself some portion of the good-will of your orator's business of manufacturing and selling shirts and to destroy for his own profit by unlawful means the reputation and demand for your orator's shirts, wholly without your orator's consent and against its protest, has manufactured and sold shirts similar in kind to those of your orator, but of inferior quality, and has used upon said shirts and in connection with the sale of the same your orator's said trade-mark by marking upon the shirts by him, the defendant, sold and on printed matter used in connection therewith a star and has offered and sold shirts not by or for your orator made bearing a representation of a star and continues so to do notwithstanding your orator's repeated protests in the premises, in violation of your orator's rights and to its loss and injury.

And your orator says, upon information and belief, that the de-

fendant has sold shirts not by or for your orator made bearing said fraudulent mark in commerce among the several States and has, without your orator's consent, reproduced, counterfeited, copied, and colorably imitated your orator's said registered trade-mark and has affixed the same to merchandise of substantially the same descriptive properties as those set forth in your orator's said registration and continues so to do after due notification of the infringement, to your orator's great loss and injury.

And your orator charges, on information and belief, that by reason of the acts of the defendant aforesaid your orator's trade has been interfered with and profits which of right belong to your orator have been diverted to the said defendant and continue to be diverted and the public have been and continue to be misled and the shirts of the defendant have been sold and continue to be sold as the true and genuine shirts of your orator for many years known and in demand, as hereinbefore set forth, and that the use by the defendant of said infringement of your orator's said trade-mark has the effect of enabling and promoting the impairment of the reputation and demand for your orator's shirts and the fraudulent and unlawful sale and substitution of defendant's shirts as and for your orator's shirts, to your orator's loss and injury and the loss and injury of the public.

And your orator says that the good-will of its said business of manufacturing and selling shirts is of great value, amounting to many thousands of dollars and more than Ten thousand dollars, and the value of its right to the exclusive use of its said trade-mark consisting of a representation of a star or the word "Star" is many thousands of dollars and more than Ten thousand dollars, and that it cannot with certainty state the amount which it is entitled to recover from the defendant by reason of his infringement of your orator's said trade-mark, but upon information and belief your orator charges that the amount which it is entitled to recover by this suit by reason of the acts of the said defendant hereinbefore recited amounts to more than the sum of Three thousand dollars.

To the end, therefore, that your orator may obtain relief in this Honorable Court, where alone it can obtain relief, it humbly prays:

1. That the said Joseph Loewy may be made defendant to this bill of complaint and compelled to answer each and every allegation therein contained, but not under oath (an answer under oath being hereby expressly waived), the same as if directly interrogated as to each.

2. That the said Joseph Loewy may be compelled to render a full, true, perfect and complete account of all profits by him made by reason of the unlawful use of the representation of a star in connection with the manufacture and sale of shirts not produced by or for your orator and may be compelled to pay over the same to your orator, and in addition thereto may be compelled to pay to your orator the damages your orator has sustained by reason of said infringement, and that the Court assess the same or cause the same to be assessed under its direction, and that the amount thus assessed and found as the actual damages may be increased to three

times the amount thereof in accordance with the statute in such cases made and provided.

3. That an injunction issue herein perpetually restraining and enjoining the said Joseph Loewy, his clerks, attorneys, agents, servants and workmen, and all in privity with him or claiming or holding through or under him, from in any manner whatsoever making use in connection with any shirt or analogous article not by or for your orator made of the representation of a star or the word "Star", whether alone or in combination with other words or devices, or any word or device like or substantially like them or either of them in sound or appearance, and from selling and from offering to sell or otherwise disposing of any shirt or analogous article to which shall be applied in any form or manner whatsoever, either alone or in combination with other words or devices, the representation of a star or the word "Star", or any representation or word like or substantially like either of them; and otherwise in every way from infringing your orator's said trade-mark.

4. That a restraining order or preliminary injunction be issued without delay directed to the said Joseph Loewy, enjoining and restraining him as set forth in the next preceding paragraph numbered 3.

And, finally, to the end that equity may be done and the relief herein prayed for and all other relief that it may be righteous in the premises to administer may be afforded your orator, may it please your Honors such relief fully to grant, and to award
11 against the said Joseph Loewy a writ of subpœna of the United States of America issuing out of and under the seal of this Honorable Court, commanding him on a day certain therein to be named and under a certain penalty, to be and appear in this Honorable Court, then and there to answer all and singular the premises and to stand to and perform and abide by such further order, direction and decree as may be made against him.

And your orator, as in duty bound, will ever pray, etc.

ARCHIBALD COX,
Solicitor for Complainant.

ARCHIBALD COX,
Counsel for Complainant.

STATE OF NEW YORK,
County of New York, ss:

George S. Brown, being duly sworn, deposes and says: That he is the Treasurer of the corporation complainant named in the foregoing bill of complaint; that he has read said bill of complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

GEORGE S. BROWN.

Subscribed and sworn to before me this 14th day of May, 1906.

[SEAL.]

THOS. W. FOLSOM,
Notary Public (51), *N. Y. Co.*

12 *Answer.*

(Filed July 2, 1906.)

In the Circuit Court of the United States, Southern District of New York. In Equity.

HUTCHINSON, PIERCE & Co., Complainant,
vs.
JOSEPH LOEWY, Defendant.

Defendant's Answer.

Answer of Joseph Loewy, Trading as Joseph Loewy & Company, to the Bill of Complaint of Hutchinson, Pierce & Co.

This defendant now and at all times hereafter reserving unto himself and all matter of benefit or advantage by exception or otherwise which can or may be had or taken to the manifold errors, uncertainties, insufficiencies, and imperfections in said bill of complaint contained for answer to said bill or to so much and such parts thereof as this defendant is advised it is necessary for him to answer unto, answering says:—

The defendant admits that he is an inhabitant of the City of New York, in the Southern District of New York, and a sole trader carrying on business under the firm name and style of Joseph Loewy & Company at said City.

But whether the said complainant is a corporation and doing business under and by virtue of the laws of the State of New York and having a principal place of business in the City of New York, defendant has no information sufficient to form a belief and
13 therefore denies and leaves the same to be proven as complainant may be advised.

Further answering the complaint of the complainant herein defendant alleges that he has not information sufficient to form a belief and, therefore, denies that the complainant is engaged in the business of manufacturing and selling shirts, waists, underwear and furnishings, and that it was founded in or about the year 1840 and that from the year 1840 to the present time has been continuing business and that it is a business of large proportion and a source of profit and benefit and advantage to the public and leaves the same to be proven as complainant may be advised.

Further answering the complaint of the complainant defendant alleges that he has not information sufficient to form a belief, and, therefore, denies that the business, if any, of the complainant, has been a continuous business owned and carried on by T. A. Morison and Hoyt, and the several successors named in the bill of complaint and that the complainant is or ever became in all things the owner and proprietor of said business and assets of the said firm of T. A. Morison and Hoyt and Company, and its several successors or is now

the lawful owner of any trade-mark originated or used by said T. A. Morison and Hoyt or their predecessors.

Further answering the complaint of the complainant, defendant has no knowledge sufficient to form a belief and, therefore, denies that the complainant in 1896 succeeded to the business alleged or to any business which had been continuously carried on without interruption for sixty years or any other period of time, and that the said complainant is now the owner of any such business alleged or any trade-marks, trade-names, property, legal or equitable of any such firm named which it is entitled to protect by law or in equity as against this defendant.

Further answering the complaint of complainant defendant alleges that he has not information sufficient to form a belief
14 and, therefore, denies that in the year 1883, any firm under the title or name of Hutchinson, Pierce & Company succeeded to any business of manufacturing shirts, waists, underwear and furnishings and the exclusive right to use in connection therewith as a trade-mark and trade-name the arbitrary mark, symbol, designation, "Star" or that any such symbol or designation has been continuously used and availed of as a trade-mark and trade-name by any of the firms and co-partnerships mentioned in the bill of complaint or that the complainant has continuously used and is now using the said symbol and designation "Star" as a trade-mark and trade-name for shirts, waists, underwear and furnishings and, therefore, leaves the same to be proven as complainant may be advised.

Further answering the complaint of complainant defendant alleges that he has not information sufficient to form a belief and, therefore, denies that the complainant's alleged predecessors were the first to use the symbol of a "Star" as a trade-mark or designation and the first to use the designation "Star" in connection with shirts, waists, underwear and furnishings, and the first to symbolize the expression "Star" by means of the said "Star" or the symbol of a "Star" or both the word and symbol, and that the said mark, or either, or any of them, have been continuously used for many years by this complainant or any predecessor, as alleged, upon any goods manufactured or sold by this complainant or any predecessors, as alleged, or upon any advertising matter, boxes, signs, packages, circulars or other matters issued by this complainant or any predecessors and that any goods of the description mentioned are or have been well and widely known to the trade and public and identified as the true and genuine products of said business by means of any such trade-mark or were designated, asked for, bought and sold as "Star" shirts, and by the representation or figure of a "Star" and that the popularization of said trade-mark and trade-name "Star" has greatly enlarged and extended and, therefore, leave the same to be proven as complainant may be advised.

15 Defendant further answering the complaint of complainant alleges that he has not information sufficient to form a belief and, therefore, denies that for a period of fifty years, or any other period of time, the said trade-mark "Star" expressed by the word or symbol has been, by the complainant, and its predecessors,

continuously and notoriously used as the mark and name under which any shirts or other goods have been marked and sold and that the said complainant or its predecessors have, for fifty years, or any other period of time, applied and affixed to any goods, as described, as a trade-mark, the form or symbol of a "Star" or the word "Star," or both the symbol and equivalent word, for the purpose of indicating the origin and genuineness of any such goods or articles, and differentiated the said goods and articles from goods and articles of similar make made and sold by others, and that any goods, which may have been made by the complainant or its predecessors, have been continuously known, identified, referred to, asked for, ordered and sold as "Star" shirts, or by the symbol of a "Star" or by the trade-mark or trade-name "Star" in connection with any such goods or that any such goods have been widely and generally known and used throughout the United States and elsewhere by the trade and purchasers as a distinctive mark and authenticity to denote and identify any such goods as the product of the complainant or its predecessors and, therefore leaves, the same to be proven as complainant may be advised.

Defendant denies upon information and belief that the complainant or its predecessors have ever established its exclusive right to the exclusive use of the symbol of a "Star" and of the equivalent word or expression "Star" as a trade-mark or trade-name for shirts or any other goods in the same class in any Court of law of the United States or any of the States or that any final decrees have been entered in which the right of complainant and its predecessors of the exclusive use of said trade-mark "Star" was judicially ascertained and established.

16 Defendant further answering the complaint of complainant alleges that he has not information sufficient to form a belief and, therefore, denies that the Circuit Court of the United States in and for the Northern District of Illinois at any time decided and held that the complainant's predecessors rightfully adopted the "Star" both in word and symbol so that "Star" goods has come to be the common designation of the goods of said firm, which were called for and referred to as "Star" shirts, and "Star" waists, as the case may be, and, therefore, requires that the complainant produce in Court a duly and properly authenticated copy of the proceedings, decision, decree and judgment set out in its bill of complaint.

Further answering the complainant's complaint defendant denies upon information and belief that since the alleged date of the alleged decision in the alleged suit, goods have been identified and sold by means of the trade-mark "Star" and that such trade-mark has been in general use by the trade and public as meaning and denoting only complainant's production and guaranteeing their origin and genuineness, and, therefore, leaves the same to be proven as complainant may be advised.

Defendant denies that complainant is entitled to be protected in the exclusive use and against any and every other use of the symbol of the "Star" and the word "Star" alone or in combination with other

words or symbols as a trade-mark upon any goods against any person whatsoever, and particularly against this defendant.

Defendant admits that one certain certificate of registration was issued by the United States Patent Office, bearing number 51,146, for an alleged trade-mark alleged to be owned by this complainant, but whether said registration in the Patent Office was in accordance with the Act of Congress in such cases made and provided, defendant has not sufficient information to form a belief and, there-
17 fore, requires that complainant bring into Court a duly authenticated copy of such proceedings.

Defendant denies any knowledge of the reputation of complainant's shirts or other goods or the amount of demand existing for the same, or the ownership by the complainant of the representation of a star or the word "Star" as a trade-mark or trade-name for said goods or any of such goods.

Defendant denies having diverted or continuing to divert, or to secure to himself any portion or portions of the good will of complainant's business, if such exists, in manufacturing and selling shirts, or to destroy for his own profits by any unlawful means, any reputation or demand which may exist of the complainant's shirts or goods or shirts or goods similar in kind to those of complainant's, if any there be, of any inferior or any other quality and that he has used upon shirts or any other goods in connection with the manufacture and sale of the same, the complainant's trade-mark or any mark, in the semblance of any trade-mark lawfully owned and controlled by the complainant upon shirts or any other goods, or on printed matter used in connection with the manufacture or sale of shirts or similar goods, any trade-mark or trade-name lawfully the property of the complainant, or has offered for sale any goods bearing said mark to the loss or injury of the complainant.

Defendant further alleges that he has never manufactured and sold, or offered for sale, any shirts or other goods, or issued any printed or advertising matter, in any manner bearing a star as a trade mark, or any mark in the semblance of a star alleged by complainant to be and constitute their trade-mark.

Defendant further denies that he has, at any time, or in any manner, reproduced, counterfeited, or copied any mark lawfully used by the complainant or used any mark substantially or approximately of the same description as any mark lawfully owned or used by the complainant or any mark liable to deceive the public or any individual of the public into believing that the said mark so used
18 by him was the mark of complainant or any mark used by complainant to identify any goods manufactured or sold by complainant.

Defendant further denies that the complainant's trade has been interfered with and profits which by right belong to the complainant have been diverted to said defendant or continue to be diverted or that the public have been and continue to be misled by any unlawful act of this defendant or that the shirts made or dealt in by this defendant have been sold or continue to be sold as the shirts or goods of the complainant, or that any trade of the

defendant has had or is having the effect of enabling and promoting the impairment of the reputation of and demand for the complainant's shirts or other goods and denies any fraudulent and unlawful sale and substitution of defendant's shirts or other goods to the complainant's loss and injury and to the loss and injury of the public.

Further answering complainant's complaint, defendant denies knowledge sufficient to form a belief as to the value of complainant's business, if any, and denies complainant's exclusive right to use as a trade-mark the representation of a star or the word "Star" or the value to complainant of the use of such trade-mark or trade-name, or any other trade-mark or trade-name used by complainant.

Defendant denies that complainant is entitled to recover, by this or any other suit, by reason of the accounts or premises herein and in the bill of complaint recited in the amount of three thousand dollars or any other amount whatsoever.

Further answering complainant's complaint, defendant alleges that on the first day of May, 1867, the business of which he is now the proprietor and conducting under the firm name and style of Joseph Loewy & Co. was established by one Leopold Loewy. That said business was continued without interruption by the said Leopold Loewy individually, until the year 1870, at which time one Morris Senftenberg and this defendant entered into co-partnership
19 with the said Leopold Loewy, said co-partnership doing business under the firm name and style of Loewy, Senftenberg & Co. That the said business was continued without interruption by the said Leopold Loewy, Morris Senftenberg, and this defendant up to April 1, 1879, when the said Morris Senftenberg retired from the business and the business was continued uninterruptedly by Leopold Loewy and this defendant under the firm name and style of Leopold Loewy & Bro. That said business was continued by Leopold Loewy and this defendant as co-partners uninterruptedly until Aug. 15, 1891, at which date this defendant acquired the interest of Leopold Loewy and continued the business uninterruptedly as a sole trader under the firm name and style of Joseph Loewy & Co. up to and including the present date.

Defendant further alleges that the present business and the goodwill of said business has been continuously and uninterruptedly conducted by this defendant and his predecessors in said business since May 1, 1867.

That at or about the day of inception of the said business the then proprietor of the business, Leopold Loewy, originated and used upon the goods made by himself and upon boxes containing said goods, and upon printed matter and advertising the symbol of a comet and the word "Comet," which said symbol and word, in combination, were used and have been continuously used by the said Leopold Loewy and his successors in the business, including this defendant, and from the said year 1867 to and including the present date, as a trade-mark or trade-name for the goods manufactured and sold by the said Leopold Loewy and his successors in business, including this defendant. That the business in which the said Leopold Loewy and his said succes-

sors, including this defendant, have been engaged is the manufacture and sale of shirts, waists, and similar goods, and that all of said goods have been so marked with the said symbol and word "Comet" and by no other trade-mark or trade-name.

20 The defendant further alleges that he and his predecessors at all times since on or about the inception of the said business in the year 1867, have used and is now using the said symbol of a "Comet" in combination with the word "Comet," and that he or his predecessors have continuously and exclusively used the said symbol and word "Comet" upon their goods, and upon the various packages in which their goods are shipped and marketed, and upon printed and advertising matter as a trade-mark and trade-name.

That the said mark used exclusively by this defendant and his predecessors, to wit, the symbol "Comet" and the word "Comet" does not in any manner resemble a "Star" such as is alleged to be used by the complainant, and is not such a mark as would deceive the public or any purchaser into believing that he was receiving the goods of complainant.

Defendant further alleges that his said use of the said mark consisting of the symbol of a "Comet" in connection with the said word "Comet" or the said symbol or word separately has been notorious and well known by the public and the trade since the inception of the said business in or about the year 1867, and that the use of the said mark and the use thereof by this defendant and his predecesors, is and was well known by the complainant corporation and its predecessors, and has been so known for a great number of years.

That the defendant and his predecessors in business, have used the said mark "Comet" for over thirty-nine years last past, and that at the present time or during said term of thirty-nine years this defendant and his predecessors have used no other mark, and is not now using any other mark upon shirts, waists, underwears, furnishings and similar goods.

The defendant and his predecessors having used the said mark "Comet" exclusively and only during the entire existence of the defendant's business, and the business of his predecessors, it is believed, that the said mark "Comet" is the mark referred to by the complainant, and by the complainant alleged to be an infringement

21 upon a mark "Star" alleged to be owned by complainant, and that the complainant having knowingly and without objection permitted the use of the said mark "Comet" for the period of time aforesaid, has been lax in enforcing or attempting to enforce any rights or fancied rights possessed by the complainant or its predecessors in the premises, and that the said complainant should now be estopped from interfering in any manner with the right of defendant and his successors to use the said mark "Comet" in any manner whatsoever.

Defendant further alleges that on or about the 29th day of March, 1906, he filed in the United States Patent Office an application for registration of the trade-mark above described consisting of the words "The Comet" and the representation of a "Comet." That after proceedings duly had in conformity with the statute in such cases made

and provided, the United States Patent Office did on or about the 4th day of June, 1906, allow the said application and pass the said registration for publication, and which was published in the Official Gazette of the United States Patent Office, of June 26th, 1906.

That notwithstanding the presence in the files of the United States Patent Office of the complainant's registration No. 51,146, as alleged in the bill of complaint for the same class of goods for which defendant's mark was allowed, the said complainant's mark was at no time during the proceedings had in the said matter cited by the Commissioner of Patents as an anticipatory reference, or in any manner interfering with the registration of defendant's mark, all as will fully appear by the records of said proceedings had, or a duly authenticated copy thereof in this court to be produced and to your Honors exhibited as your Honors may direct.

All of which matters and things this defendant is ready to aver, maintain and prove as this Honorable Court may direct; without this that any other matter, cause or thing in complainant's said bill of complaint contained, material or necessary for this defendant to make answer unto and not herein and hereby and well and
22 sufficiently answered, confessed, traversed, avoided or denied, is true to the knowledge and belief of this defendant.

Whereof this defendant humbly prays to be hence dismissed with his reasonable costs and charges in this behalf wrongfully sustained.

Defendant further humbly prays that the ownership and use of the said symbol "Comet" and the word "Comet" either singly or together be adjudged and confirmed to be in this defendant and to have resided in this defendant and his predecessors in business for the time alleged.

Defendant further prays that the complainant be adjudged to have had knowledge of the use and ownership of the said symbol "Comet" and the word "Comet" by the defendant and his predecessors for the length of time alleged, and that the complainant and its predecessors is and have been lax in enforcing or attempting to enforce against this defendant or his predecessors in business any rights of action or for infringement which the said complainant or its predecessors may believe or may have believed itself or themselves entitled to prosecute, and that the said complainant, its successors, officers, agents, servants, attorneys, employees or others deriving their authority from the complainant or its successors, be forever enjoined from interfering in any manner with the use of the said symbol "Comet" or the word "Comet", singly or in combination, by this defendant or his successors, or any person deriving authority from this defendant or his successors.

Defendant further prays this Honorable Court for such other and further relief as may be just and equitable in the premises.

JOSEPH LOEWY.

IRA JAY DUTTON,
Solicitor for Defendant.
EDWARD T. FENWICK,
Of Counsel.

New York, N. Y., June 30, 1906.

23 *Replication.*

(Filed August 6, 1906.)

Circuit Court of the United States, Southern District of New York.
In Equity.

HUTCHINSON, PIERCE & Co., Complainant,
vs.
JOSEPH LOEWY, Defendant.

The Replication of Hutchinson, Pierce & Co., Complainant, to the Answer of Joseph Loewy, Defendant.

This repliant saving and reserving unto itself now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto says that it will aver, maintain and prove its said Bill of Complaint to be true, certain and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this repliant. Without this that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied is true. All which matters and things this repliant is and will be ready to aver, maintain and prove as this Honorable Court shall direct, and humbly prays as in and by its said Bill it has already prayed.

ARCHIBALD COX,
Complainant's Solicitor.

24 *Testimony.*

United States Circuit Court, Southern District of New York.

HUTCHINSON, PIERCE & COMPANY, Complainant,
vs.
JOSEPH LOEWY, Defendant.

Testimony on behalf of the complainant, taken pursuant to notice, under and pursuant to the 67th Rule of the Supreme Court as amended, before John A. Shields, Esq., Standing Examiner, at the office of Archibald Cox, Esq., No. 229 Broadway, Borough of Manhattan, New York City, on Wednesday, October 17, 1906, at 12 M.

Appearances.

Mr. Archibald Cox and Messrs. Phelps, Evins & East, for the Complainant.

Mr. Edward T. Fenwick, Mr. Ira J. Dutton and Mr. L. L. Morrill, for Defendant.

FREDERICK W. STEARNS, called and sworn as a witness for complainant, testified as follows:

Direct examination by Mr. Cox:

Q. 1. Kindly state your full name, age, residence and occupation?

A. Frederick W. Stearns; age, 49; residence, Bridgeport, Connecticut; occupation, superintendent of Hutchinson, Pierce & Company Star shirt factory; also secretary of the Company.

Q. 2. How long have you been connected with Hutchinson, Pierce & Company?

A. Since 1874.

25 Q. 3. Continuously?

A. Continuously.

Q. 4. Was the business now carried on under that name incorporated when you first joined it?

A. No, sir.

Q. 5. It is a corporation now, is it not?

A. Yes, sir.

Mr. FENWICK: The last question and answer are objected to for the reason that it is not the best evidence of the incorporation of the Company.

Q. 6. What is the business of Hutchinson, Pierce & Company?

A. Manufacture of shirts; stiff bosom shirts, neglige shirts, both boys and men; boys' shirtwaists; underwear, cut underwear of all descriptions.

Q. 7. And those articles, or many of them, are manufactured in the factory in Bridgeport, of which you are superintendent?

A. A part of all.

Q. 8. How, if at all, are the articles or the packages in which they are shipped marked?

A. All shirts have—all our articles we manufacture have a woven label on them. Is that what you mean, sir?

Q. 9. Yes.

A. Woven label. A star with the words trade mark. "Trade" on one side and "mark" on the other.

Q. 10. And how are the packages in which the articles are shipped marked?

A. The boxes have labels on with Star shirt—of course, that varies—but with a six-pointed star in the middle, I think, of the label with "trade mark" on each side. I won't be positive about that latter statement, but I think so. This varies from time to time.

Q. 11. Could you recognize the labels if you saw them?

A. Yes, sir.

Q. 12. Kindly look at the label I now hand you, and state whether that is the label to which you referred?

A. Yes, sir, that is the label.

Q. 13. How long has a label like that been used by Hutchinson, Pierce & Company, and its predecessors to your knowledge?

A. As long as I can remember, sir; that is, I mean as long

26 as I have been with them. I don't know whether it is relevant for me to make a statement here when I first went with

POOR

them—a great many of their shirts were put up in half dozens in papers with that stamp on them.

Mr. Cox: I don't think that is material.

Q. 14. And has that label been the only label upon the package of shirts upon which it appears?

A. That or a similar one. There may be a little change in the printing of it. That is, I mean sometimes it went around this way (indicating).

Q. 15. That is to say, have the labels always borne simply the representation of a star or the word "Star" without any name of the manufacturer?

A. To the best of my opinion; yes, sir.

Q. 16. You don't recall ever having seen any which had the Company's name on them?

A. No, sir.

Q. 17. You spoke of the woven label which goes on the garments themselves. Will you kindly look at the specimen I now hand you and state whether that is a specimen of the label to which you referred?

A. Yes, sir, barring the size.

Q. 18. That is the size represented by the figure 2 on that particular specimen may be omitted or varied in other labels?

A. Yes, sir, that is (indicating) a pajama label or boy's waist.

Q. 19. Kindly look at the specimen I now show you and state whether that is the woven label that goes on shirts.

A. That is the label that goes on shirts.

Q. 20. And how long has that been used by the complainant and its predecessors on the articles of its manufacture to your knowledge?

A. As long as I can remember, which is forty odd years.

Q. 21. And have the articles themselves borne the corporate name or any mark other than that illustrated by the article last shown you?

A. Nothing except the stamp size and lot.

Q. 22. Have you knowledge of the fact that the complain-
27 ant has registered the mark shown on the labels to which you have referred as a trade mark?

A. No personal knowledge, no sir, except as I have been informed.

Q. 23. That is to say you have been informed?

A. That it was a registered trade mark, and I know they had some litigation years ago about it; I have seen the decisions and so on; nothing more than that.

Mr. Cox: I will offer in evidence the certificate of registration No. 51,146, dated April 22, 1905.

The same is marked "Complainant's Exhibit Complainant's Registration, Oct. 17, 1906, J. A. S., Ex'r."

Mr. MORRILL: Defendant objects to the introduction of the Exhibit for the reason that it is not properly authenticated, and for the further reason that no proper foundation for the introduction has been laid.

Mr. Cox: Complainant also offers in evidence the box label and shirt label referred to by the witness.

COPY

The same are marked "Complainant's Exhibit Box Label and Complainant's Exhibit Shirt Label, respectively J. A. S., Ex'r, Oct. 17, 1906.

Q. 24. In the case of Complainant's Exhibit Shirt Label, I understand that only one of these stars goes on each shirt?

A. Yes, sir.

Q. 25. That is, there are half a dozen labels on this strip?

A. Yes, one on each shirt.

Q. 26. Will you kindly look at the shirt and bill which I now hand you, and state if you recognize them, and what you know about them?

A. I recognize the shirt and the bill. On the 28th of June I bought this at the Busy Store in Bridgeport, corner of Fairfield avenue and Middle street, Bridgeport, Conn. Price fifty cents.

28 Q. 27. And the bill was given you at that time?

A. At that time, with the shirt.

Q. 28. What year was that?

A. 1906.

Mr. Cox: I offer the shirt and bill in evidence.

The same are marked respectively "Complainant's Exhibit Defendant's Shirt and Complainant's Exhibit Defendant's Bill, J. A. S., Ex'r. Oct. 17, 1906."

Mr. MORRILL: Defendant objects to the introduction of the exhibits for the reason that they are not in any way properly connected with the matter in question.

Q. 29. Will you kindly state, as near as you can remember, what transpired exactly when you made the purchase referred to in the Busy Store at Bridgeport?

A. I went and saw the shirt hanging in the window with a Star on it, which interested me, and I went in and asked for a Star shirt. The girl hesitated and said she didn't know that she had a Star shirt. I said, "You have got a shirt hanging in the window with a star on it." "Oh, yes," she says, "we can sell you one of those." She went to the window and got this shirt out and sold it to me.

Q. 30. And you bought it?

A. I bought it.

Cross-examination by Mr. MORRILL:

X Q. 31. Mr. Stearns, I don't know that I quite understand your testimony in relation to these labels, or the box label or both. I want to ask you if you testify that the name of the complainant firm never appears upon these labels or the box label; that is if these labels, I mean, the shirt labels?

A. Yes, sir.

X Q. 32. It never appears?

A. No, sir, not to my knowledge.

X Q. 33. You say not to your knowledge. Does that apply to all of these shirts made by Hutchinson, Pierce & Company or

29 only to those garments made at Bridgeport?

A. To all of them, either at Bridgeport or Norwalk.

X Q. 34. Do you want to be understood as stating that the firm of Hutchinson, Pierce & Company never at any time used labels with the star on them and the name of the manufacturing company?

A. You mean the woven labels?

X Q. 35. Either of the labels, shirt or woven label or box label?

A. That is it.

X Q. 36. What is it?

A. I mean without the firm's name.

X Q. 37. You mean they never used the firm name with the label?

A. Not to my knowledge, no, sir.

X Q. 38. Well, to your knowledge is not quite definite enough. Did the firm or did the firm not use labels, either the shirt labels or box labels with the name?

A. I was born in 1857, and I can't go back to 1840, but since I have been of any age and remember the firm or known of their production, I have never seen it.

X Q. 39. How far back is that?

A. Well, I have been connected with the firm, as I said, since 1874.

X Q. 40. Since 1874?

A. And as I say, my uncle being Mr. Hutchinson, I was in the store a great deal and got shirts from there prior to that as a small boy.

X Q. 41. Your knowledge as being connected with the firm dates back to 1874?

A. Yes, sir.

X Q. 42. And since 1874 the firm has not used labels with its name upon them—have never since that time used labels with its name on them?

A. To the best of my memory, I say no.

X Q. 43. You, I suppose, would not be willing to swear positively that they had not used labels either before or since 1874 with their name on them? I understand you are secretary of the company?

A. I have simply been secretary of the company for a week, so that don't amount to anything; but I have been manufacturing for them since the 1st of September, to the best of my knowledge it was in 1875.

30 X Q. 44. Now, you entered the firm in 1874. Your connection with the firm in 1874 was in what capacity?

A. Making myself generally useful.

X Q. 45. Can't you give us a little more definite answer than that?

A. I dusted off the boxes, and marked the boxes, packed them up, helped to pack them and sort of got out orders, and did anything I was told to as a young man.

X Q. 46. How long since you became manager of the Bridgeport end of the business?

A. I was superintendent of the flannel department in 1890; we had two superintendents. I have been general superintenden- for the past three years.

X Q. 47. Then your knowledge as a supervising employee, we will say of the company dates back only to 1890?

A. Oh, no; I had been in Norwalk from 1879 until 1890, when I was transferred to Bridgeport.

X Q. 48. In what capacity were you in Norwalk?

A. I was superintendent of what they call the custom department at that time.

X Q. 49. Since what time?

A. First day of May, 1879, to November 15, 1887-1889.

X Q. 50. Then your knowledge as a supervising employee dates back to 1879?

A. As to the manufacturing end. Well, no, I go back further than that. Excuse me. First I started my manufacturing. We had a department in New York to the best of my recollection, it was about 1st of December, 1875, that I started up there in the custom department. We transferred the department to Norwalk in 1879, the 1st day of May.

X Q. 51. Does the complainant firm use any other label on their boxes than the one in evidence?

A. Yes, sir.

X Q. 52. What labels do they use? What other labels? What is on them, what wording?

A. Why there are special labels made for special firms at times, the same as the special woven labels are used.

X Q. 53. What appears on some of those labels for in-
31 stance?

A. Well, I can cite Rogers, Peet & Company.

X Q. 54. What appears on the Rogers, Peet labels?

Mr. Cox: I object to that as immaterial and irrelevant and not cross-examination, and in no way concerned with this suit or anything involved in it.

X Q. 55. Answer the question, please? (X Q. 54 repeated.)

A. I couldn't give it to you, sir. I can't answer it because it is not clear enough in my mind, they change it so often.

X Q. 56. Are there any labels for other firms that the complainant company put on the box that you can remember?

A. Why, there are quite a number of different firms who furnish a box label, but it don't come to my mind I could describe them.

X Q. 57. Are all of the goods manufactured by the complainant company put out under other firm's names? That is, you mentioned Rogers, Peet & Company. Are those goods, for instance, put out under the name of Rogers, Peet & Company?

A. No, they all have the star; what we call the combination label made for Rogers, Peet & Company.

X Q. 58. Does Rogers, Peet & Company's name appear on that label?

A. Yes, sir.

X Q. 59. Does the star appear on the same label with Rogers, Peet & Company?

A. Yes, sir.

X Q. 60. Does that label you mentioned there also appear on the same box with Rogers, Peet & Company's label?

A. This label here (indicating)?

X Q. 61. That box label in evidence?

A. No, sir, I should say that it was what might be termed a combination box label as well.

X Q. 62. Now, go back to the question I tried to get at before. Are any of the goods that the complainant company puts out provided with this label on the box only?

A. Oh, yes.

X Q. 63. On the box with that label, is there any label or
32 other way of putting on the complainant company's name on the box anywhere?

A. No, sir.

X Q. 64. Does the complainant company's name appear on any of the boxes or packages containing shirts or other garments that are manufactured by the complainant company?

A. No, sir.

X Q. 65. Now, Mr. Stearns, what I want to get at is this: Does the complainant company make or sell any goods of the nature described in the bill of complaint upon which their name as manufacturers, wholesalers or other dealers appears upon the goods, boxes or packages in which the goods are packed, shipped or sold?

A. No, sir.

X Q. 66. Now, Mr. Stearns, do you want to qualify that last statement in any way?

A. I want to simply say I won't make a statement that on the shipping cases in which are packed 10 or 15 or 20 dozen of these half dozen or quarter dozen boxes that there may not be "from Hutchinson, Pierce & Company," the same as there would be on the end of an envelope; that I didn't say.

X Q. 67. Now, you have qualified that as regards to packing cases in case of a shipment of a small lot to say one dozen shirts. You wouldn't want to say the name of Hutchinson, Pierce & Company did not appear upon the wrapper that was wrapped in?

A. No, sir, I wouldn't say that.

X Q. 68. Mr. Stearns, has the complainant company any shipping labels or tags upon which the name of Hutchinson, Pierce & Company appears, either with or without the star?

A. I can't say.

X Q. 69. Did you have charge of the shipping, the supervision of the shipping?

A. From the Bridgeport end.

X Q. 70. Do they not use any shipping tags or labels there on the goods?

A. On the boxes?

X Q. 71. On the boxes or other packages they ship goods in—any shipping tags or labels?

A. Why, the cases are marked for their destination.

X Q. 72. You mentioned in your testimony shirts manufactured for Rogers, Peet & Company?

A. Yes.

33 X Q. 73. Now, can you estimate about how many other firms you make those special brands of goods for—just roughly?

A. No, sir.

X Q. 74. Are there a great many of them?

A. They are being reduced all the time.

X Q. 75. Are there still quite a number of them?

A. There may be in this coming season, and there may not be any.

X Q. 76. In the last past season??

A. Yes, there were quite a number of them.

X Q. 77. Couldn't you estimate*ly* approximately how many, whether it was 100 or a thousand or 10,000?

A. It would simply be guesswork. I couldn't answer it, no, sir.

X Q. 78. Could you tell whether it was 100 or 10,000?

A. Well, it is between the two.

X Q. 79. It is more than 100 and less than 10,000?

A. Well, it might not be a hundred; I am not in a position to say, sir.

X Q. 80. Now, on all of these goods you manufacture, these special orders,—does the name of the firm for which you manufacture them appear?

A. Oh, no.

X Q. 81. Do they in the majority of cases?

A. No.

X Q. 82. Do they in some of the cases?

A. Yes, sir.

X Q. 83. What ordinarily else in a general way would appear upon those labels besides the name of the party for whom you manufacture those shirts?

A. Well, "made for."

X Q. 84. Take Rogers, Peet & Company for example?

A. They have what we call a combination label, which has our trade mark, the same as this (referring to Complainant's Exhibit Defendant's Shirt Label). It would have underneath the star here, or maybe over it, "Rogers, Peet & Company," and often, in some instances have "made for Rogers, Peet & Company." I won't state that positively about that combination label.

X Q. 85. But their name would appear on it with the star?

A. Rogers, Peet, yes.

34 X Q. 86. You state, too, that there are instances where the name appears upon the label with the star and without the words "made for," as, for instance, take the name we have been using, Rogers, Peet & Company, with the star beneath it or above it without the words "made for"; is that correct?

A. I think in all cases it is "made for."

X Q. 87. Do you wish to be understood by your last answer that none of these labels for the special orders contained the name of the party for whom the shirts are made with the star and without the words "made for"?

A. To the best of my knowledge we make none without the "made for" on it.

X Q. 88. Does this apply to all special orders?

A. No, sir, we make a great many special stock lots that have no name on it at all, just our star. A large majority of our stock lots—what we call special stock lots—are made simply that way, but there are firms that request their labels to be put on in place of ours, and whenever it is put on in conjunction with ours, you find the Star on top and the special label which they furnish is put underneath, and in all cases, it says, "made for." Meggs & Company, of Bridgeport, for instance.

X Q. 89. You say they furnish their labels?

A. Their own labels.

X Q. 90. Their labels with their name on and also with the star thereon?

A. No, sir.

X Q. 91. The star isn't on?

A. No, sir.

X Q. 92. In no case, no instance?

A. Not that they furnish; when it is a combination label, we furnish it.

X Q. 93. You furnish the label?

A. Yes.

X Q. 94. Then the name of the firm appears with the star?

A. Yes, sir.

X Q. 95. And your name does not appear—that is the name of the complainant company does not appear?

A. No, sir, on no label.

Adjourned to Thursday, October 18, 1906, at 10 A. M.

35 NEW YORK, *October* 18, 1906.

Met pursuant to adjournment.

Present: Counsel as before.

JOSEPH LOEWY, called and sworn as a witness on behalf of the complainant, testified as follows:

Direct examination by Mr. COX:

Q. 1. Mr. Loewy, you are the defendant in this case, are you not?

A. Yes, sir.

Q. 2. And you carry on business under the name of J. Loewy & Company?

A. Yes, sir.

Q. 3. And the business of J. Loewy & Company is what?

A. Shirt making.

Q. 4. Will you kindly look at the shirt which I hand you marked Complainant's Exhibit Defendant's Shirt, and state whether that is one of the shirts of your manufacture?

A. I couldn't swear to that.

Q. 5. You can't tell whether it is or not?

A. I couldn't, no, sir.

Q. 6. You observe the mark in the upper part of the shirt near the neck band?

A. Yes.

Q. 7. Do you mark the shirts of your manufacture with a mark identical to that?

A. Not identical, a similar mark.

Q. 8. How then does it differ from the mark?

A. I can't tell; I ain't got my mark with me.

Q. 9. Do you think it does differ at all?

A. It might; it might not.

Q. 10. Well, what point are you doubtful about? Where do you think there might be dissimilarities?

A. In the whole construction; I can't say except I saw the two marks together, the size.

Q. 11. Does the mark you use have a star with a tail to it like that?

A. Yes, some similar mark, yes, sir.

Q. 12. But it has the same star?

A. Yes, sir, similar to that.

36 Q. 13. Do you think that might be your mark? You wouldn't say it was not?

A. I wouldn't swear to that, either way.

Q. 14. Is there no way you can tell a shirt as being of your manufacture?

A. Not quite well; we all make the shirts alike.

Q. 15. There is nothing except the mark to say who it is manufactured by, is there?

A. Yes, sir.

Q. 16. What else?

A. The cloth is made for a good many; not only for one.

Q. 17. The cloth is?

A. Yes.

Q. 18. It all depends on the mark; that is the only way to tell who makes it?

A. About, yes; we consider that to be manufactured by—the cheapest shirts are made likewise by a good many manufacturers.

Q. 19. And the only way you can tell one manufacturer from the other is the trade mark; is that right?

A. Yes, sir, that is about right.

Q. 20. And the trade mark on that particular shirt before you, is either your trademark or one very like it?

A. Some similar trademark, yes; a similar mark.

Q. 21. You put upon your shirts, as I understand, a mark so like that that you can't point out any feature wherein it differs?

A. Well not very well, except I have not got my mark with me. Many imitations made, too. There are imitations made of this mark too.

Q. 22. That is either your mark or an imitation of it? Is that a fair way of stating it?

A. I can't understand.

Q. 23. Well, we will put it in a different way: You manufacture shirts where, here in New York?

A. Here in New York.

Q. 24. And where are they sold?

—. All around the United States.

Q. 25. Do you know whether any of them are sold in Bridgeport?

A. Might be.

Q. 26. And those shirts that you manufacture and that are sold in various parts of the United States bear a mark which has
37 a star on it like the star shown in Complainant's Exhibit Defendant's Shirt; is that right?

A. Some similarity with it, yes.

Q. 27. Well, it is the same sort of a star?

A. Similar star, yes, sir; something similar, yes; I would not swear that this is a star, but something similar to that.

Q. 28. Have you advertised your shirts?

A. Yes, sir.

Q. 29. Will you kindly look at the advertisement I now hand you and state whether that is the kind of advertisement you have used in advertising?

A. It might be, but I don't attend to the advertising, so I wouldn't swear that I seen it, even. It might be; it looks like one of our advertisements.

Q. 30. It looks like one of your advertisements?

A. Yes, sir.

Q. 31. You know, do you not, that you advertise in the same way as that?

A. Yes, sir, some similar way to that.

Q. 32. And the name of that advertisement and the address, are your name and address, are they not, or the name and address of your business?

A. That was at the time. You see that is Lispenard street there.

Q. *32.* You have issued advertisements, have you not, bearing the star with the tail, as shown there?

A. I suppose a similarity to it, yes.

Q. 33. Well, you haven't any doubt that is one of your advertisements, have you?

A. Well, I wouldn't swear to it, but that is a similar advertisement as I did in the Haberdasher.

Mr. Cox: I offer that in evidence.

Mr. Morrill: Counsel for defendant objects to the introduction of this exhibit on the ground that it has not been properly identified as in any way connected with the suit or with the defendant's business.

Marked "Complainant's Exhibit Defendant's Advertisement, Oct. 18, 1906, J. A. S., Ex'r."

38 Q. 34. You use letter paper having your own letter heads in your business, do you not?

A. Yes, sir.

Q. 35. Will you kindly look at the letter head I now hand you, and state whether that is a specimen of the letter heads used by you?

A. I think it is a similar letter head; yes, sir; we use that letter head.

Q. 36. Isn't it exactly the same as the letter head used by you?
A. If I see it; it might be the same, yes, sir, as our letter heads.
Q. 37. Well, the letter heads used by you have the star contained in the sample, as shown there, do they not?
A. In a similar way, yes.
Q. 38. When you say "similar," you mean the same, don't you?
A. Yes, similar style.
Q. 39. Well, what is the difference between that and the ones which actually appear on the letter heads used by you?
A. Because we change even the letter heads. We don't have these stars appear on the letter heads; we haven't got that letter head all the time.
Q. 40. You don't use that all the time?
A. Oh, no; this is only a fancy of my boys to put that in. I was opposed to that myself.
Q. 41. You were opposed to that?
A. I didn't like the red.
Q. 42. Didn't like the red?
A. No.
Q. 43. Do you use the same sort of letter head, only printed in black?
A. No, not quite.
Q. 44. You remember at one time you did use letter heads like that?
A. I suppose, yes.

Mr. Cox: I offer that in evidence.
Marked "Complainant's Exhibit Defendant's Letter head, Oct. 18, 1906, J. A. S., Ex'r."
Mr. Morrill: Counsel for defendant objects to the introduction of this exhibit on the ground it has not been properly identified as in any manner connected with this cause of action or the defendant's business.

39 Q. 45. What sort of letter heads do you use now? Do they show the star in the same way as that letter head?
A. I am not positive; I couldn't tell.
Q. 46. Do you attend to your own business every day?
A. Yes, sir.
Q. 47. Don't you frequently sign letters?
A. I do not; not always.
Q. 48. Don't you frequently do it?
A. Sign letters, no.
Q. 49. Never sign letters?
A. Very seldom.
Q. 50. You never see the letters that go out from your business?
A. Not always.
Q. 51. Well, how often do you see them?
A. Might be some rare occasions.
Q. 52. Oh, you don't attend to your own business?
A. Not to the letter writing.
Q. 53. Who attends to the letter writing.

A. The bookkeeper.

Q. 54. And what part do you do?

A. General overseeing.

Q. 55. You saw the letter head to object to the red, didn't you?

A. Yes, but it was after it was printed.

Q. 56. Well, did you use up what was printed?

A. I suppose we had to.

Q. 57. And you have no idea of the sort of letter head you use now?

A. I couldn't tell exactly.

Q. 58. Well, can you give me any idea?

A. Well, it might be the same; same that there is on this here, only no red star in it.

Q. 59. No star at all?

A. No star at all even.

Q. 60. Are you willing to swear that is the kind of letter head you use now?

A. I would not swear to it, because I want to see them first; I am not positive.

Q. 61. Well, you say it might be. Have you ever seen any without the star?

A. Sure, we had them without the star.

Q. 62. When did you have that?

A. Only the name Comet and no star.

Q. 63. What?

A. Only the name Comet and no star.

40 Q. 64. When was that?

A. All the time we had them.

Q. 65. Then you have two kinds or had two kinds, one with the star and one with just the name Comet?

A. No, only the way the young fellows feel like it; they try to improve.

Q. 66. Tried to improve by adding the star in red?

A. By adding sometimes the star and sometimes something else.

Q. 67. And you remember that once they tried to improve by adding the star in red as shown there?

A. I suppose so; that is a few years ago.

Q. 68. And you don't know what kind of letter heads you use now at the present time?

A. I really don't know if there is any star in it or not. There is a Comet in it anyway.

Q. 69. But you don't know whether the star is there; it may be just the word?

A. I can't tell; no star; we never used the word "star."

Q. 70. But you have used the symbol of a star?

A. We did not took it for that.

Q. 71. Do you remember receiving a letter from Phelps & East requesting you to discontinue the use of the star on shirts as an infringement of the trade-mark of Hutchinson, Pierce & Co.?

A. I slightly remember it, yes, sir.

Q. 72. And you remember receiving a letter from me subsequently to the same effect?

A. That I would not swear to; I can't remember.

Q. 73. Well, you remember that Hutchinson, Pierce & Co. through some one did complain of your use of the star, do you?

A. Yes, sir.

Q. 74. And you continued applying it to your shirts just the same notwithstanding that protest, did you not?

A. Because I had no star in my emblem.

Q. 75. That is the reason you did it?

A. Yes, sir.

Q. 76. But you did continue just the same?

A. Sure.

Q. 77. And the emblem that you had no star in, as you
41 say, was the same as the one shown on the shirt here?

A. Some similarity, yes, sir.

Q. 78. That is it had a star neither to a greater nor less extent than that?

A. There was always some similarity with this one here. We call it a Comet, no star. Never use the word "star."

Q. 79. Well, you speak of some similarity. The point I want to get at is whether it always had that figure of a star?

A. It might have some figure, yes, sir.

Q. 80. Well, did it? You say it might have?

A. Well, I suppose so; we don't consider that a star; we call it a comet. A comet is not a star.

Q. 81. Well, what I want to get at is not the word, the figure, the star with a tail to it?

A. Yes, we don't call it a star.

Q. 82. I don't care what you call it. What I am trying to get at is whether you continued to put on your shirts a figure like that (referring to Complainant's Exhibit Defendant's Shirt)?

A. Yes, sir, I suppose we did.

Q. 83. Well, you know you did, don't you?

A. Yes, sir.

Cross-examination by Mr. FENWICK:

X Q. 84. How long have you been in the shirt business, Mr. Loewy?

A. Since about 1872.

X Q. 85. Has your business been extensive or small—in the manufacture of shirts has it been extensive or small during that period?

A. If you will allow me to explain, I started in making shirt fronts or bosoms, and after that went on a small scale in the shirt line because I didn't have much money. I made shirt fronts in 1870 and shirts in 1872 about two years later on a small scale.

X Q. 86. Has your business continually grown in the manufacture of shirts since 1872?

A. Yes, sir.

X Q. 87. Are you to-day quite an extensive manufacturer
42 of shirts, what might be called quite an extensive manufacturer of shirts?

A. About belonging to the medium class.

X Q. 88. Under what name? Did you apply any name to your shirts?

A. Yes, sir.

X Q. 89. What name?

A. Comet.

X Q. 90. Under what name are these shirts known on the market?

A. Comet shirts.

X Q. 91. Did you ever apply the word "star" to any shirts made by you?

A. Never did; never had any reason.

X Q. 92. Have you ever applied the representation of a star on shirts manufactured and sold by you?

A. No, sir, never.

X Q. 93. When did you first commence using the representation of a comet on shirts?

A. My brother had been using it before me, and in 1876 I joined my brother, and we were fourteen years together under the firm name of L. Loewy & Brother.

X Q. 94. From what date did your brother commence using the representation of a comet on shirts?

Mr. Cox: That is objected to as calling for testimony beyond the knowledge of the witness.

A. About 1872.

X Q. 95. Have you personal knowledge of that fact?

A. Yes, sir.

X Q. 96. And in 1876, you joined your brother in the manufacture and sale of shirts?

A. Yes, sir.

X Q. 97. Has the business been continuous by use since 1876?

A. Up to 1891; we were together about fourteen years.

X Q. 98. From 1891 under what name has the business been carried on?

A. Formerly by L. Loewy & Brother.

X Q. 99. From 1891 under what name has the business been carried on?

A. Under J. Loewy & Company; my name.

43 X Q. 100. From 1876 to 1891, under what name was it?

A. From 1876 to 1891 under L. Loewy & Brother.

X Q. 100*a*. Were you a member of the firm of L. Loewy & Brother?

A. Yes, sir.

X Q. 101. From 1876 to 1891?

A. Yes, sir.

X Q. 102. And from 1891 you have carried on the business personally up to the present time?

A. Yes, sir, buying out my brother.

X Q. 103. Then, as I understand it, you went alone in the manufacture of shirt fronts in 1870?

A. Yes, sir.

X Q. 104. And 1872 in the manufacture of shirts which you continued to conduct alone until 1876?

A. Yes.

X Q. 105. And then joined your brother?

A. Yes.

X Q. 106. Under the firm name of—what is it?

A. L. Loewy & Brother.

X Q. 107. Which firm continued until 1891?

A. Yes, sir.

X Q. 108. And in 1891 you bought out your brother?

A. Dissolved partnership.

X Q. 109. You say you bought out your brother, dissolved partnership, you buying out your brother and continued the business of shirts down to the present time; is that it?

A. That is correct, yes, sir.

X Q. 110. During that period from 1872 to the present time the representation of a comet has been used continuously on shirts manufactured by your brother from 1872 to 1876, and by you and your brother from 1876 to 1891, and by you alone from 1891 to the present time; is that correct?

A. That is correct; yes, sir.

X Q. 111. Do you use any word in connection with the representation of a comet on shirts made and sold by you?

A. The name "Comet."

X Q. 112. Do you always use the word "comet" in connection with the representation of a comet on shirts made and sold by you?

A. Yes, sir.

X Q. 113. The place of business of Hutchinson, Pierce &
44 Co. is in New York City, is it not?

A. Yes, sir.

X Q. 114. Have you ever used the word "star" or representation of a star on a shirt made and sold by you?

A. Never did.

X Q. 115. About how long ago was it that you first received notice from Hutchinson, Pierce & Co. or their attorneys, alleging that you were infringing upon their trade-mark?

A. I think that is around 1903—about three years ago, now.

X Q. 116. Is that the first notice you ever received from that firm or their attorneys?

A. Yes, sir.

X Q. 117. Claiming that you were infringing their mark?

A. Yes, sir.

X Q. 118. When you received this notice, about 1903, did you continue to use your comet trade-mark on shirts as heretofore?

A. Yes, sir.

X Q. 119. About when was the last time you received notice from Hutchinson, Pierce & Company, or their attorneys, that you were infringing upon their trade-mark?

A. When I received Mr. Cox's complaint.

X Q. 120. About how long ago was that?

A. That is only a few months ago.

X Q. 121. Did you receive any notices from Hutchinson, Pierce & Co. or their attorneys between 1903 and about three months ago that you were infringing upon their trade-mark rights?

A. I can't remember; I can't remember that.

X Q. 122. Is this the first action for infringement of their trade-mark rights which has been brought against you by Hutchinson, Pierce & Co.?

A. Yes, sir.

X Q. 123. Has Hutchinson, Pierce & Co. known of the use by you and your brother of the representation of a comet upon shirts made and sold by you?

Mr. Cox: That is objected to as calling for testimony beyond the knowledge of the witness.

A. I can't answer that.

X Q. 124. Have you sold shirts to the same parties that
45 Hutchinson, Pierce & Co. have sold shirts?

A. In many cases, yes.

X Q. 125. Were your Comet shirts and the Star shirts of Hutchinson, Pierce & Company on sale in the same stores at the same time?

A. I suppose so, sure. They are yet.

X Q. 126. Have you any doubt about that?

A. No doubt at all; they are yet in many stores.

X Q. 127. Have you seen shirts having upon them the representation of a star exactly like that of Complainant's Exhibit Shirt Label, on shirts in stores and at the same time seen in the same stores other shirts having your comet trade-mark upon the same?

A. Yes, sir.

X Q. 128. How long to your personal knowledge have you either alone or in connection with your brother, and how long has, to your personal knowledge, Hutchinson, Pierce & Co. been putting shirts on the same market marked as indicated in the last question?

A. As to my shirts, since 1872; as to Hutchinson, Pierce & Co., I can't remember that.

X Q. 129. Have Hutchinson, Pierce & Co. for a number of years been placing the representation of a star on shirts in the same market with yours?

A. As far as I remember, yes, sir; I see it on boys' waists, too.

X Q. 130. Have you seen it on dress shirts?

A. I can't remember that; we mind our own business.

X Q. 131. For a number of years you have seen on the market shirts having the representation of a star upon the same not made by yourself, and in the same market have seen shirts manufactured by you or your Company bearing your Comet trade-mark and sold in the same market, and have received no notice that you were infringing prior to 1903; is that correct? The first time you received notice of infringement was in 1903?

A. That is right, the first time.

X Q. 132. Have you secured registration at the United States Patent Office for your Comet trade-mark?

A. Yes, sir.

46 X Q. 133. How recently was this?

Mr. Cox: That is objected to as the certificate should be produced.

A. A few months ago.

Redirect examination by Mr. Cox:

Re-D. Q. 134. You spoke in your cross-examination several times of your trade-mark of the Comet. What was that? What did it look like?

A. A mark like a comet is marked.

Re-D. Q. 135. What is that? Can you describe it?

A. A little star with a tail to it.

Re-D. Q. 136. Was it like the mark that appears on that shirt Exhibit that is there?

A. Yes, some similarity, yes, sir.

Re-D. Q. 137. Well, you say some similarity: What I want to get at is, how did it differ?

A. Well, like it.

Re-D. Q. 138. It was exactly like it, was it?

A. I can't swear to this that it is or that it is exactly like that, unless I am positive it is mine.

Re-D. Q. 139. I understand you don't want to say that is your shirt, but you can tell whether the mark on it is exactly like your mark?

A. Like my mark, yes.

Re-D. Q. 140. It is?

A. Yes, sir.

Re-D. Q. 141. Have you got one of your marks with you?

A. No, I have not.

Re-D. Q. 142. Your brother, I understand, was engaged in the shirt business before you?

A. Yes, sir.

Re-D. Q. 143. And where was he then, where was his business?

A. In the same place, Lispenard street.

By Mr. Fenwick:

X Q. 144. In New York City, you mean?

A. In New York City all the time.

47 By Mr. Cox:

Re-D. Q. 145. You were both in the same place, but the businesses were separate; is that it?

A. Yes, sir.

Re-D. Q. 146. Did you have offices together at that time?

A. Well, we were partners.

Re-D. Q. 147. I mean before that time did you have offices together before you formed the partnership?

A. When I came to this country in 1870, we had offices together, yes, sir.

Re-D. Q. 148. And how long had your brother been engaged in the shirt business before that, do you know?

A. If you will allow me to explain, you know, as I said before, my brother was here five years ahead of me, and he was in the manufacturing of shirt fronts; might be in 1867 and using the trade mark the way as anybody would use any kind of a mark to distinguish his shirt fronts or shirt bosoms from others, and using the mark Comet, the same as you see it here, or similar mark to that.

Re-D. Q. 149. That was before you came to this country?

A. That was before I came to this country, yes.

Re-D. Q. 150. And he was then making shirt fronts?

A. Yes, sir, fronts.

Re-D. Q. 151. What does that mean, he made fronts; sold them to some manufacturers of shirts?

A. At that time, you see, there were not many manufacturers, not as many as there are now, and people used to buy fronts and buy muslin and used to make their own shirts.

Re-D. Q. 152. Yes, I understand your brother made fronts and sold them to manufacturers?

A. No, to store keeps, and manufacturers, yes.

Re-D. Q. 153. The fronts that your brother made were sold to the stores then and not to manufacturers?

A. And manufacturers of shirts; there were some shirt manufacturers at that time, too.

Re-D. Q. 154. And those shirt makers would buy your brother's fronts, as I understand it, and make them into shirts?

A. Yes, sir.

48 Re-D. Q. 155. Did you ever see any of those fronts?

A. Surely. I dealt in them. I dealt in fronts myself.

Re-D. Q. 156. I mean those made by your brother?

A. Sure; you see as my brother was ahead of me, I came with him and he gave me his samples and I went out selling them and through that I seen them.

Re-D. Q. 157. A shirt front, as I understand, is the bosom of the shirt?

A. Exactly.

Re-D. Q. 158. Now, of those you saw manufactured by your brother, where were they marked?

A. Marked—they ain't marked; there is a paper label put on, right in the dozen; there is a dozen tied together, and the label goes in front and marked what number of linen and what lot number and the mark—a little ticket marked Comet.

Re-D. Q. 159. A little ticket; was that paper or woven?

A. Paper ticket; was not woven.

Re-D. Q. 160. On the dozen?

A. Yes.

Re-D. Q. 161. And that was being used before you came to this country, you think?

A. Yes, sir.

Re-D. Q. 162. Then when you first came to this country you acted as salesman for your brother, as I understand?

A. Not quite.

Re-D. Q. 163. Well, what did you do?

A. I was selling for my own account.

Re-D. Q. 164. You did not act at all as your brother's representative?

A. No.

Re-D. Q. 165. You started right in, then, as I understand, manufacturing shirt fronts for yourself?

A. Oh, no. I sold his fronts. He as a brother gave me a chance to make a living and gave me his samples and I sold his fronts for him but for my own account.

Re-D. Q. 166. Oh, I see. The fronts you sold were made by him and sold by you, but for your own account?

A. Yes, sir.

Re-D. Q. 167. Now, when did you first make any fronts yourself?

A. Around in January, 1871.

Re-D. Q. 168. And those fronts that you made were marked how?

49 A. Fancy labels; I didn't use the comet at all.

Re-D. Q. 169. What do you mean by a fancy label?

A. You know, a fancy paper label marked shirt fronts.

Re-D. Q. 170. How—without any mark?

A. Without any mark.

Re-D. Q. 171. And you continued to make shirt fronts and sell them without any mark for how long—until you went in partnership with your brother?

A. Partnership with my brother, yes.

Re-D. Q. 172. And that was in 1876, was it?

A. 1876.

Re-D. Q. 173. Well, now, during that period before 1876, did you make shirts?

A. Yes, sir.

Re-D. Q. 174. And how were they marked?

A. Bunker Hill.

Re-D. Q. 175. Bunker Hill?

A. Yes.

Re-D. Q. 176. And how long did you continue to make the Bunker Hill shirts?

A. Well, until I came with my brother together.

Re-D. Q. 177. Until you went in with him?

A. Yes.

Re-D. Q. 178. And then did you stop making Bunker Hill shirts?

A. Then I stopped making Bunker Hill.

Re-D. Q. 179. When you joined your brother in 1876, did you only make one kind of shirts; that is one name, one brand?

A. One brand.

Re-D. Q. 180. That is all you made?

A. Yes, that is the Comet.

Re-D. Q. 181. You didn't make any for manufacturers?

A. No.

Re-D. Q. 182. And where did you sell them at that time?

A. At that time—New York, New Jersey, Pennsylvania; all around.

Re-D. Q. 183. What do you mean by all around?
A. As far as we could reach.
Re-D. Q. 184. That is what I want to get at: How far did you reach?
50 A. All the States; nearby States, you know; New York State, Jersey, Pennsylvania, Connecticut.
Re-D. Q. 185. About how many people did you employ making the shirts then?
A. At what year?
Re-D. Q. 186. Well, while you were in partnership with your brother, the first part of it, from 1876 on?
A. That varied. We started with one cutter and stopped with six.
Re-D. Q. 187. Started with one and stopped with six?
A. Yes.
Re-D. Q. 188. When you dissolved partnership you had six?
A. Yes.
Re-D. Q. 189. And six cutters means how many people altogether? I suppose there are other people besides?
A. Well, there are helpers; three or four helpers.
Re-D. Q. 190. What was the character of the shirts you made during that period? Were they dress shirts?
A. Yes, sir.
Re-D. Q. 191. Dress shirts and neglige shirts?
A. Yes, sir, mostly white shirts at that time.
Re-D. Q. 192. Did you advertise to the public at that time?
A. Yes, we had a Boston office, and we had a salesman in Chicago, and we had a salesman going around the several States—agents.
Re-D. Q. 193. I mean printed advertisements? Did you issue any of those to the public?
A. I can't remember that.
Re-D. Q. 194. Hasn't it only been within the last four or five years you have advertised in papers?
A. That might be—continuously, yes. We might advertise occasionally, but that continuously only about three or four years.
Re-D. Q. 195. Prior to that it would only be on occasions?
A. On occasions, yes; moving or any other occasion.
Re-D. Q. 196. Notify people of the change of address, or something of that kind?
A. Yes.
Re-D. Q. 197. Your brother and you separated in 1891,
51 I understand, and you then had six cutters: Did you increase that number later on?
A. No.
Re-D. Q. 198. That is as many as you ever had?
A. Yes, sir.

By Mr. FENWICK:

X Q. 199. You mean you only have six cutters now?
A. Not now.

By Mr. Cox:

Re-D. Q. 200. I don't think you understood. I mean since that time have you increased the number of cutters in your employ?

A. I did not; I decreased them.

Re-D. Q. 201. You decreased them?

A. Yes, sir.

Re-D. Q. 202. Well, how many have you now?

A. Three.

Re-D. Q. 203. Well, has the business grown in the last few years?

A. Yes, sir.

Re-D. Q. 204. Well, how do you get along with fewer cutters if you have more business?

A. Machines.

Re-D. Q. 205. Well, how does the business now compare with the business at the time you and your brother separated, in size? Is it much larger now?

A. Not much, no. It is about the same individually. At that time we were two together.

Re-D. Q. 206. That is you have personally twice as much business, because you have your brother's share as well as your own?

A. Yes.

Re-D. Q. 207. But the business as a whole is about the same size?

A. Is about the same, yes.

Re-D. Q. 208. Are you familiar with the shirts made by other people on the market?

A. I know some makes, but I am not familiar with them.

Re-D. Q. 209. Well, mention some of the shirts you know of, please?

A. In which way?

Re-D. Q. 210. By their names, if you know their names?

A. Palmetto shirt is one; Eureka; my brother is using the
52 Giant, and I suppose the Manhattan; next to the Manhattan is the Matteawan.

Re-D. Q. 211. That is an imitation of the Manhattan, is it?

A. That is not an imitation, but I think it is intended for that.

Re-D. Q. 212. Do you remember any of the shirts that were on the market when you first went into the shirt business made by other people?

A. Well I hardly paid attention to it.

Re-D. Q. 213. Don't remember?

A. Don't remember.

Re-D. Q. 214. You have heard of the Star shirt, have you not?

A. Not from that time, I didn't have much to do with it.

Re-D. Q. 215. I mean you have heard of it?

A. Yes.

Re-D. Q. 216. You have known of it for a good many years, haven't you?

A. More Star waists than I know about the shirts. To be honest, I know more about Star waists than I know about their shirt.

Re-D. Q. 217. What shirtwaist do you mean?

A. The Star shirtwaist.

Re-D. Q. 218. Do your duties take you out into the trade to any extent? I mean by the trade, outdoors where shirts are sold to consumers?

A. Not now.

Re-D. Q. 219. Not now?

A. No.

Re-D. Q. 220. Well, have they at any time?

A. I have been travelling myself, selling my own goods for about twenty-five years, and I seen all the other goods.

Re-D. Q. 221. Then you saw all the other goods?

A. Yes, lately, the last eight or ten years.

Re-D. Q. 222. When you were travelling, didn't you frequently encounter the Star shirt?

A. No, I can't remember I paid attention to the Star shirt; a great many others.

Re-D. Q. 223. You saw a great many others, but not the Star, you think?

A. Yes, I remember—I remember the waist; I seen the Star waist, shirtwaist around.

53 Re-D. Q. 224. And you don't remember seeing the Star shirts?

A. No, till I seen them in my son's store.

Re-D. Q. 225. Until you seen them in your son's store?

A. Well, I seen them in my son's store.

Re-D. Q. 226. Was it not the same son that suggested the letter head with the red star?

A. Oh, no, this son has got a store in New York.

Re-D. Q. 227. A different son?

A. A customer of Hutchinson, Pierce & Company.

Re-D. Q. 228. As I understand it, then, you have one son in business with you, and another son that is in business by himself?

A. I have got eight sons, and one has got a retail store on his own account, and about five are with me in the business; five sons.

Re-D. Q. 229. You have preserved the records of the business from the time it was a partnership, have you?

A. Well, some I suppose I did.

Re-D. Q. 230. Have you any old letter heads or bill heads or anything of that kind that would show the trade mark that you used while you were in partnership?

A. I suppose I could; I can't remember that I got them—if I kept them.

Re-D. Q. 231. You think you did?

A. Yes, I think we have some yet with the comet on.

Re-D. Q. 232. Well, would you mind looking for those and if you find them producing them?

A. Yes.

Re-D. Q. 233. You will produce them if you can find anything of that kind?

A. Yes.

Re-D. Q. 234. You spoke on your cross examination of protests on behalf of Hutchinson, Pierce & Co. against your use of the feature

of the mark which consists of a star: Don't you remember those protests were repeated several times between the fall of 1903 and the time this suit began?

A. It might be; but I can't remember.

Re-D. Q. 235. Don't you remember receiving letters of the Messrs. helps & East and also letters from me?

A. No, I can't remember, no. I don't open the letters myself.

Re-D. Q. 236. You don't open the letters?

54 A. Not all the letters.

Re-D. Q. 237. Do you remember whether that advertisement in the Haberdasher in 1903 was the first advertisement you put out for the general public?

A. I don't think it was. We advertised in former years; not quite as heavily.

Re-D. Q. 238. You think the advertising started before 1903?

A. We advertised in some of the directories.

Re-D. Q. 239. In the directories?

A. In the commercial directories; there are several.

Re-D. Q. 240. Can you remember any of those you advertised in?

A. That is very far back; I can't tell.

Re-D. Q. 241. Perhaps you would have records of some of those?

A. No.

Re-D. Q. 242. What do you mean by advertising in the directories; having your name printed in bigger type?

A. Bigger type; that is what I mean.

Re-D. Q. 243. Aside from that kind of advertising, wasn't the advertisement in the Haberdasher the first advertisement or one of the first advertisements you put out?

A. I don't think so, no; we had others.

Re-D. Q. 244. Well, wasn't it about that time you commenced general advertising?

A. Oh, no, long ago. We had a small space first off.

Re-D. Q. 245. That was about the first big space?

A. About, yes; I am not positive; even that I don't attend to. It was one of my sons.

GEORGE S. BROWN, called and sworn as a witness on behalf of the complainant, testified as follows:

Direct examination by Mr. Cox:

Q. 1. Mr. Brown, are you connected with Hutchinson, Pierce & Co., the complainant in this suit?

A. I am.

Q. 2. Are you an officer of that company?

A. I am.

55 Q. 3. What office do you hold?

A. I am president and treasurer.

Q. 4. Hutchinson, Pierce & Co. is a corporation, is it?

A. It is.

Q. 5. How long have you been connected with Hutchinson, Pierce & Co.?

A. Well, you mean Hutchinson, Pierce & Co. and their predecessors, don't you?

Q. 6. Yes. Well, you have been connected with the corporation since it was organized?

A. Oh, yes; I have been connected with the Star shirt and Hutchinson, Pierce & Co. and predecessors ever since November, 1869.

Q. 7. Continuously?

A. Continuously.

Q. 8. Have you knowledge of the fact that Hutchinson, Pierce & Co., of which you are president has registered its trade mark in Washington?

A. I have.

Q. 9. Please look at the certificate I now hand you, marked Complainant's Exhibit Complainant's Registration, and state whether that is the registration of the complainant?

A. It is.

Q. 10. Has that certificate or the trade mark it purports to cover, or any right in either of them been transferred by Hutchinson, Pierce & Co. since its issuance?

A. Not any right of any kind.

Q. 11. It still belongs to the corporation?

A. It still belongs to the corporation.

Q. 12. What is the business of Hutchinson, Pierce & Co.?

A. Manufacturing and selling the Star shirts, Star shirtwaists, Star blouses, Star underwear, and so forth and so forth.

Q. 13. And has that business been uninterruptedly carried on by Hutchinson, Pierce & Co. and its predecessors ever since you were connected with it?

A. It has.

Q. 14. Do you recall how the shirts produced in that business were marked when you first went with the predecessors of the complainant?

A. Why, at that time our shirts were put up in paper packages, with a star on the end of the package, and a star on the top
56 of the package, and this goes back a long ways so that this information I shall have to be a little particular about, giving it to you in this way—that I can't recall whether each shirt was then at that time stamped with a star trade mark, but they were either stamped at that time or within a few months afterwards, because we used the stamp of a star until we adopted the woven label, but as to when I went there in 1869, the Star shirt was recognized on the market all over the country, and we had maintained a house in San Francisco where the Star shirt was equally well known, so that, as far back as that the Star shirt was recognized in the market as the leading shirt of its kind, because the proprietors always maintained their standard.

Q. 15. About when roughly did you substitute a woven label for the stamp, do you remember?

A. Well, I couldn't tell exactly, but it was precisely the same as the star which was stamped on the shirt, except it was woven. Earl & Wilson use their trade-mark with a stamp and not a woven label.

Q. 16. And the woven label which was substituted for the stamp

and identical with it, was a label like that shown in Complainant's Exhibit Shirt Label, was it not?

A. Yes.

Q. 17. When the boxes were adopted for the shirt, how were they labeled or marked?

A. They had a printed label on the end of the boxes with the Star trade-mark thereon.

Q. 18. And was that label like the label marked "Complainant's Exhibit Box Label?"

A. No, because this is a lithographed label and we used in former years a much smaller printed label.

Q. 19. What did the printed label have on it, what did it show?

A. That I couldn't tell you; that is 37 years ago, nearly. I might make a sketch from memory.

Q. 20. Can you state generally what it was?

A. It had a Star trade mark on, a lot number and neck and sleeve length was marked on the label.

57 Q. 21. Did the firm or corporate name appear on the label?

A. It never has.

Q. 22. You are familiar with the labels like the label marked "Complainant's Exhibit Box Label," are you not?

A. Yes, sir.

Q. 23. And they have been used by the complainant and its predecessors?

A. They have.

Q. 24. For about how long should you say?

A. I should say fully twenty-five years.

Q. 25. And prior to these lithographed labels they had the printed labels to which you have referred?

A. Yes.

Q. 26. Has the position and reputation of the Star shirt in the market, to which you have referred, been maintained throughout your connection with the business?

A. It has.

Q. 27. Do you recall that at times the complainant or its predecessors have added to the markings of its boxes or shirts the names of dealers together with the words "made for"?

A. They have, to large customers.

Q. 28. Do the larger number of shirts bear the name of the dealer with the words "made for" or simply the Star shirt with the emblem?

A. Oh, simply the Star shirt. I don't know whether this part of the answer is relevant, but as you have asked the question, I might say that special label business, as it is called, is one we are fast eliminating from our business, so the proportion of shirts that are specially labeled is a very infinitesimal part of our business today.

Q. 29. And in all instances where the special label was added, I understand the words "made for" or equivalent words were used, were they not?

A. Not in all cases, no.

Q. 30. In some cases it would simply have the address of the dealer?

A. In rare cases we would do that.

Q. 31. And in those cases where the special labels were used,
58 they were used in response to requests from dealers for purposes of advertising that dealer was handling the shirts, I suppose?

A. It might be a case where a man advertised himself as a shirt maker and had sometimes placed large orders which helped us in running our factory, and we would make them up for him, put his own label on.

Q. 32. What proportion of the shirts made by you having special labels have also had the Star trade-mark on them?

A. I should think 90 per cent.

Q. 33. You do make some shirts simply for other manufacturers?

A. No, not for other manufacturers.

Q. 34. Other dealers that don't go out as Star shirts at all?

A. We make a very few, and those few we are cutting out as fast as we can so as to avoid the feeling. You can readily understand in a business as old as ours where we have had customers for years and have done a little special work for, we find it very hard to cut them off entirely at once, and have therefore continued in a small way doing this special labeling business.

Q. 35. Where have the Star shirts of complainant and predecessors been sold during your connection with the business?

A. All over the United States, and Sandwich Islands, a few in South America, Australia, Japan and Canada.

Q. 36. And by all over the United States you mean in all the principal cities?

A. I do.

Q. 37. And can you give us some idea how largely they have been sold by comparing them with the sales of other shirts or otherwise?

A. I don't see how I could possibly give you that. I know nothing positive about the volume of business of other shirt concerns any more than they do about ours.

Q. 38. Well, the Star shirt is recognized and has always been as one of the leading shirts on the market?

A. Decidedly. It was so recognized back in 1869, as I told you before. It certainly has not lost any of its prestige since that time.

Q. 39. Have you heard or been informed concerning the manufacture and sale of shirts by the defendant herein bearing a
59 mark illustrated by the shirt which I hand you marked Defendant's Shirt?

A. I have.

Q. 40. When did you first hear of the use of that mark?

A. I don't think I could give you the exact date, but it was my impression it was marked on the first advertisement I saw.

Q. 41. Will you kindly look at the advertisement I hand you marked Complainant's Exhibit Defendant's Advertisement, and state whether that is the advertisement to which you referred?

A. Yes.

Q. 42. Do you recall about when you saw that advertisement?

A. The date is right on here, October, 1903.

Q. 43. That was the first knowledge or intimation you had of the use of such mark by the defendant?

A. As far as I can remember.

Q. 44. Upon having your attention directed to that, what did you do?

A. Mr. Pierce was president at that time and he took the matter up, as I remember, with Messrs. Phelps & East, who conducted some correspondence.

Mr. MORRILL: I object to the testimony as hearsay.

Q. 45. Can you state whether the owners of the complainant's business during the period that you have been connected with them, that is since 1869, have taken steps to prevent the use of the representation of a Star on shirts by others?

A. I can.

Q. 46. What have they done in that direction, roughly speaking. I don't care to go into details?

A. Well, as far as my memory recalls, I should think we have had at least 12 to 18 suits within that time, which have all been decided in our favor.

Mr. MORRILL: I object to the testimony; the records of the Court are the best evidence.

A. (Continuing:) We have notified a great many in-
60 fringers by mail and they have desisted and we have their letters on file in many cases.

Q. 47. Have you in every instance where you learned of the use of a star on shirts by others taken action to correct it promptly?

A. I believe we have. Of course, it is very difficult for me to go back thirty-seven or eight years when I was only a young boy there and tell you here without going over our records of the old firm to see. It has been the purpose of our house and continuous aim to protect their trade mark and so long as I could remember they have done so.

Q. 48. You know, since you have been concerned in the active management of the business you have always promptly corrected any infringement?

A. Yes, we have.

Q. 49. And you know of no instance except that before us of the defendant, where the star has been used without being stopped by legal proceedings taken by you?

A. No.

Cross-examination by Mr. MORRILL:

X Q. 50. Mr. Brown I believe the customary preliminary question as to your age was omitted: Will you please state it?

A. I was born September 13, 1856.

X Q. 51. Then at 1869 you were 13 years old?

A. I was.

X Q. 52. Now, in regard to these special order shirts that you make for dealers, they furnish their own labels, do they?

A. Yes.

X Q. 53. And those labels contain whatever wording they see fit together with this representation of a Star?

A. No, not whatever wording they see fit.

X Q. 54. Well, all right.

A. We certainly wouldn't permit anything to go on our shirts that would affect our own trade mark.

X Q. 55. It consists then of the representation of this star together with their name?

61 A. It would be something like this trade mark: Star made for Rogers, Peet & Company, New York.

X Q. 56. You stated a little while ago it did not always contain the words "made for"?

A. No. I think you are in error. The question was asked me as to whether we sometimes put on labels leaving off our trade mark, and in reply to that I stated we do occasionally, a very small percentage of our business for some old customers; that is my answer to that.

X Q. 57. Do you not put on labels for people who represent themselves to the trade as manufacturers and who are really not manufacturers—labels bearing their name with the representation of a star without the words "made for"?

A. In other words, do we put our Star trade mark on for a man who represents himself as a manufacturer?

X Q. 58. That was the question?

A. Emphatically no.

Adjourned to Friday, October 19, 1906, at 1 P. M.

NEW YORK, *October* 19, 1906.

Met pursuant to adjournment.

Present: Counsel as before.

JOSEPH LOEWY, recalled.

By Mr. Cox:

Q. 1. Mr. Loewy, did you succeed in finding anything showing the use of the comet in the early days?

A. I did not.

Q. 2. Did you find any papers or other matter relating to the business in the early days of it; that is prior to say 1890?

A. Oh, my, yes. I wrote for a bill and I will get it, maybe tomorrow.

62 By Mr. MORRILL:

Q. 3. He asked if you found anything?

A. I didn't find anything. Whatever I did find had no date on it.

By Mr. Cox:

Q. 4. Did you find any papers relating to the business that were dated prior to the last three or four years, of any kind?

A. What paper do you want?

Q. 5. I want to know if you found any kind?
A. No, I didn't look for them. I looked for the other papers.
Q. 6. What other papers?
A. I mean the bill heads.
Q. 7. Well, did you find any bill heads dated more than two or three years ago?
A. I find them in my customers' places.
Q. 8. You did find them?
A. I did find them in my customers' places, but I ain't got them here yet.
Q. 9. Oh, they will be here?
A. Yes.
Q. 10. Did you look through the records of your business for old bill heads or letter heads or labels?
A. They are not dated.
Q. 11. Did you look?
A. Sure I did, but they are not dated.
Q. 12. Well, did you find any old ones of any kind?
A. They are the same way as we got them now.
Q. 13. What way; you didn't seem to know yesterday?
A. The labels, the Comet.
Q. 14. You didn't find anything that was dated?
A. Nothing dated, no. We don't date any of those things.
Q. 15. Well, wasn't there anything dated. Not necessarily a bill. Didn't you have old letter heads, for instance, with the figures "189" that were used during the nineties or something of that kind?
A. Yes. I can find a whole lot of them. I looked for 1870.
Q. 16. You didn't look for any kind except the '70s?
A. Yes, sir.
63 Q. 17. Did you find anything in the '70s at all?
A. I found my own start, when I started in business.
Q. 18. That was what?
A. Well, I got a business card and I found a statement.
Q. 19. Did those have on them any mark?
A. The statement was marked 1873, and the bill head is marked—it is 187 and the blank.
Q. 20. Well, did they have any trade mark on them?
A. They had my trade mark, yes, sir.
Q. 21. What was that?
A. That was the Bunker Hill.
Q. 22. But you didn't find any with the name Comet?
A. I didn't use the comet at that time.
Q. 23. Well, I mean you didn't find any in the business?
A. I didn't look not as far back as that.
Q. 24. Well, what was the earliest one you found with the word Comet on it? Did you find any with the word "Comet"?
A. I had none.
Q. 25. Didn't find any?
A. I didn't find any. I had none at my disposal; you can't have any if you want them.
Q. 26. Well, if you have kept the papers which show the use of

the name Bunker Hill, you must have similar papers showing the use of the name Comet if you used it, haven't you?

A. I suppose so, sure.

Q. 27. Well, why can't you find those them?

A. I didn't look so far; they were not in my possession. Comet was not in my possession; it was in my brother's possession.

Q. 28. Well, you have all the papers of the business since it became a firm, anyway?

A. Yes.

Q. 29. Well, they are in your possession, aren't they?

A. We destroyed or sold all the old paper when we moved from 50 Lispenard street to 594 Broadway.

Q. 30. You destroyed all the old papers?

A. We destroyed all the old papers, yes, sir.

Q. 31. Well, what was the use of looking for them yesterday?

A. I looked in my private desk in my residence; I thought I might find some one dated back.

64 Q. 32. Then you didn't look down at the place of business?

A. In business I couldn't find them at all, because they were sold or destroyed, sold to the paper man.

Q. 33. And that was when? When was it they were destroyed?

A. It will be in February three years.

Q. 34. You destroyed them three years ago?

A. About, yes. I didn't look for any of later dates. I looked only for the old ones, and the old ones were destroyed.

Q. 35. Well, what was it you destroyed, up to when?

A. A few cases of old paper we couldn't move along.

Q. 36. Well, do I understand you destroyed some and didn't destroy others?

A. Oh, we kept some, you see. I think I can give you some in the '80's or above 1880. I kept some.

Q. 37. Did you keep all the papers after any particular date?

A. Well, about two or three years we kept papers back, about two or three years; that would be about six years.

Q. 38. You kept them running back for about six years ago?

A. Yes, about.

Q. 39. That is, six years from now?

A. That is six years from now, back there now.

Q. 40. And you destroyed all those prior to that time?

A. Not destroyed them; we sold them.

Q. 41. Well, sold them to be destroyed?

A. Yes.

Q. 42. Well, then, there is nothing in existence, so far as you know in your business that dates back of six years ago?

A. Oh, yes, lots of things.

Q. 43. Well, what?

A. Oh, I can give you any papers you desire. Six years back I can give you any paper you desire.

Q. 44. Oh, I mean before that?

A. Before, no.

Q. 45. Everything in any way connected with the business prior to June, 1900, was destroyed?

A. Yes, 1887, might be 1888.

Q. 46. Well, did you look for any copies of the old labels?

65 A. We had none. We had always the same. The copy of the label to-day is the same as it has been before.

Q. 47. Well, did you look for any of the old labels?

A. There would be no date on them.

Q. 48. What?

A. The labels have no date.

Q. 49. Well, do you mean it wasn't worth while to look, or you didn't look or what?

A. I didn't look for labels exactly, but at the same time there would be no date on the labels; I couldn't tell if they are 10 or 15 or 20 years old; I couldn't tell; there is no date printed on them.

Q. 50. I understand that at one time you used papers that went around the dozen shirts: You don't use those any more, do you?

A. They used to be shirt fronts.

Q. 51. Shirt fronts?

A. Yes, not shirts.

Q. 52. You never used those around shirts?

A. Sometimes around fancy shirts.

Q. 53. Well, did you look for any of those?

A. I didn't look for them, no. I know I didn't have any in 1870; I didn't have them then.

Q. 54. I understand that all that you found in your search through your papers were some old papers relating to the trade mark Bunker Hill?

A. Oh, no. I can find for you more than a man can carry.

Q. 55. But I thought all your papers were destroyed up to 1900?

A. I know, but since that time.

Q. 56. Oh, you can find plenty since that time?

A. Sure.

Q. 57. But the only thing you found prior to that time were papers relating to Bunker Hill?

A. That is what I looked for. I looked for papers of 1870. I didn't look for any paper in 1880 or 1890.

Q. 58. Well, are there any papers of 1880 or 1890. Can you look for them?

A. I suppose there are some cases some customers kept the bills up, and I might be able to supply you with some.

Q. 59. Well, do you think those bills would show the trade-mark?

A. That is what it is—I hardly think so.

66 Q. 60. You don't think they would?

A. I hardly think so.

Q. 61. Do you know whether you put the trade-mark on your bills now?

A. Now we put it on, yes, sir.

Q. 62. You do it now?

A. For the last ten or twelve years.

Q. 63. Well, then, you ought to be able to find some that are ten years old or so that have the trade-mark shown?

A. Oh, yes, I think I could.

Q. 64. Well, now, do your bills now have the picture of the star with the tail to it as well as the word or just the word?

A. The picture and the word.

Q. 65. They have both?

A. Yes.

Q. 66. Do they have the word "Bonton" on them?

A. Not now, no.

Q. 67. Well, did they ever have "Bonton" on them?

A. Yes, sir.

Q. 68. When was that?

A. When we made the better grade; that is about a few years ago. Might be two or three years ago. We made Bonton and Comet; took the Bonton for the better class and the comet for the Comet shirt.

Q. 69. And how long did you make the Bonton; how many years back did that go?

A. That is only a few years.

Q. 70. Only went back a few years?

A. Only went back a few years.

Q. 71. And while you were making both the Bonton and the Comet, the letter heads and advertisements were like those you were shown yesterday, the Bonton on one side and the Comet on the other, and the Star with the tail to it in the center?

A. Yes, sir.

Q. 72. Do you think you can remember the label that was used on the bundles of shirt fronts while the partnership between you and your brother existed?

A. I can remember well, yes.

Q. 73. Remember what it looked like?

A. Yes.

Q. 74. What color was it?

A. The labels have been blue.

67 Q. 75. They were blue?

A. Yes, sir.

Q. 76. You mean solid blue background?

A. The label itself was first blue and the comet had a different blue. It was a kind of an abstract. Only a little bit of a mark similar to this shirt mark.

Q. 77. You mean that the whole label was in two shades of blue?

A. Yes, sir.

Q. 78. No other color on it?

A. And white.

Q. 79. Oh, and white?

A. Yes.

Q. 80. What part was white, the background?

A. The background was white, yes. The part in front was white too, where the pressing came out.

Q. 81. Where did the two shades of blue come in: What was printed in two shades of blue?

A. The words "shirt fronts" and then there was a little blank left to put in the number and quality.

Q. 82. Well, do you mean that some of that was in one shade of blue and the rest of it in another shade of blue?

Mr. MORRILL: I object to the question on the ground that the direct testimony of this witness is closed and that the testimony is not the proper subject matter for re-direct.

A. They might be. I am not positive over that. I am not quite positive.

Q. 83. Well, is that all that was on the labels?

Same objection.

A. Yes, sir.

Q. 84. Didn't the word "Comet" appear on them?

A. In figure only.

Q. 85. Only the figure?

Same objection.

A. Yes.

68 Q. 86. And that figure was the star with the tail to it?

Same objection.

A. Yes, sir.

Mr. MORRILL: You may note that the same objections apply to each question and answer without being repeated.

Q. 87. Well, now, about when do you think they first put the word "Comet" on in connection with the figure?

A. I can't remember that; it is too far back.

Q. 88. Are you sure that that figure when the word did not appear had a tail to it?

A. Yes, sir. I suppose so.

Q. 89. Sure it always had the tail?

A. Yes.

Q. 90. Do I understand that since the Bonton was given up the only shirts you have made are the Comet?

A. We use that name, the label Comet only.

Q. 91. On all of them?

A. Yes, sir.

Q. 92. And those were the only ones you made?

A. Just now, yes, but we still have the Bonton; we still continue the Bonton.

Q. 93. Oh, you still?

A. Oh, yes.

Q. 94. Well, I am not sure I understand that: Do you mean you use the name Comet on the Bonton shirts too?

A. As I expressed before, we use the Bonton on the better or a higher grade goods and the comet on the cheaper grade.

Q. 95. Well, then, you make both Bonton and Comet still?

A. We do not; we use mostly now Comet.

Q. 96. Well, I don't get it straight. What I would like to know is whether Comet is the only kind of shirts you make now?
A. We use that word Comet just now, yes.
Q. 97. Is that the only kind?
A. Just now, yes.
Q. 98. Well, do you mean by "just now," today or what?
A. What I mean by it, any time we feel like using Bonton
69 we put on Bonton again. We have got Bonton and Comet on our sign and we are advertising under that name, too.
Q. 99. Oh, you advertise in both, but just at present you are not making Bonton?
A. Yes.

Cross-examination by Mr. MORRILL:

X Q. 100. In your re-direct testimony just now you testified that on your bill heads or letter heads, I don't remember which, you said the name- Bonton and Comet both appear together with the symbol of a Comet; is that right?
A. Yes, sir.
X Q. 101. Do those two names ever appear together on a garment?
A. No.

70 NEW YORK, *February* 14, 1907.

Met pursuant to notice.
Present: Mr. Cox and Mr. Phelps, for complainant, Mr. Morrill, for defendant.

ANTHONY MCTIERNAN, called and sworn as a witness on behalf of the complainant, testified as follows:

Direct examination by Mr. COX:

Q. 1. Where do you live?
A. I live 504 West 151st street.
Q. 2. In what business are you now engaged?
A. I am with Hutchinson, Pierce & Co.
Q. 3. How long have you been connected with the particular business carried on by Hutchinson, Pierce & Co.?
A. Since 1859.
Q. 4. Continuously?
A. Yes, sir.
Q. 5. During that time has the business been carried on under the name of Hutchinson, Pierce & Co.?
A. No, not to begin with. T. A. Morison & Hoyt it was first.
Q. 6. And do you remember who succeeded the firm of T. A. Morison & Hoyt in the ownership of the business?
A. Morison Son & Hoyt, I believe.
Q. 7. You remember at any rate that it has been the same business during the time you went with it.
A. Yes, sir.
Q. 8. Simply carried on under these different names?
A. Yes, sir.

Q. 9. You speak of the firm of Morison Son & Hutchinson: Do you remember whether they were conducting the business now conducted by Hutchinson Pierce & Company, about the year 1872?

A. I couldn't place the year, but when the firm changed they continued on the same principles and the same business.

Q. 10. And it was about that time that they conducted it as far as you remember?

A. As close as I remember; I couldn't place the date, but
71 as close as I recollect it was them years.

Q. 11. What have been your duties in the business; that is to say what have you done from day to day?

A. Well, I have got out these goods and then packed them and marked them occasionally, where they were going to; put a ticket on them; shipment ticket; took the goods off the shelf.

Q. 12. From the order?

A. From the order; I would take hold of it and get out the goods.

Q. 13. Whatever the order called for?

A. Whatever the order called for, and then they would be charged up and later on I probably packed them.

Q. 14. In that way have you been continuously familiar with the goods since 1859?

A. Yes, sir.

Q. 15. Do you remember that when you went with the business in 1859, among the goods sold were shirts?

A. Yes, sir.

Q. 16. Do you remember how the shirts were marked at that time?

A. Were marked with a Star and put in paper wrappers; wrapped up in paper instead of boxes as it is now, but the star was the same as at the present time.

Q. 17. And was the star printed on the paper wrapper as well as on the shirt at that time, if you remember?

A. To the best of my knowledge it was, but that was so long ago I had so little reason to keep track of it, it went out of my mind, of course.

Q. 18. You remember it was printed on the shirts anyway?

A. Yes, sir.

Q. 19. And has the star been continuously printed on the shirts to your knowledge since then?

A. Yes, sir.

Q. 20. When you went with the business in 1859, if that was the date, did you see a considerable number of shirts bearing the symbol of a star shipped every day?

A. Yes, sir.

Q. 21. Can you give me any idea of the extent of the business at that time?

A. Well, they had a large business then; they had a large amount of Southern trade and shipped considerable to the south,
72 previous to the war; had a big trade, a large trade scattered around; very large shipping trade to the South those days.

Q. 22. And the business has continued to be of large proportions since that time?

A. Large proportion and increasing as it came along in later years up to the present date.

Q. 23. Have you in the course of your duties had occasion to note the manner in which the shirts purchased in that business have been ordered?

A. Been ordered?

Q. 24. Yes.

A. That is by the trade that ordered them?

Q. 25. Yes; that is by what name if any they are ordered?

A. They occasionally as I recollect the time, they would come as the Star shirt—Star shirt recommended; just to the firm address, whatever the number of the firm was then, and I have seen several letters come as Star shirt coming then as today, to this concern today; that is direct from out of town. For instance, you take a western house or any place, they don't put the name today, but say only the Star shirts and it will reach this concern.

Q. 26. You mean by that, if I understand you, that the letters containing orders—that is envelopes have been addressed Star Shirt Company, New York?

A. Occasionally; not as a general rule, but I have seen them come addressed to the Star Shirt.

Q. 27. Without the name of the firm?

A. Without the name of the firm, yes, sir.

Q. 28. And the orders themselves inside the envelopes spoke of the shirts in what way?

A. Well, occasionally it would give it on the same heading; that is Star shirt; send me so and so of the Star shirts, the name, what quality and the size.

Q. 29. The shirts sold in the business with which you are connected have been marked by the figure of a Star as you have already testified; have they had in addition to that the name of the firm that manufactures them stamped on them?

73 A. Not on the shirt, no, sir.

Q. 30. Has the name of the manufacturer been on the pasteboard boxes in which they are packed?

A. Not on the pasteboard box; on the head line of the bills; not on the boxes.

Q. 31. The boxes themselves have simply borne the Star?

A. Borne the Star, yes, sir.

Q. 32. And that has been continuously so ever since you have been in the business?

A. Yes, sir.

Q. 33. When you went with the business in 1859, it was an established business, was it not; it wasn't just starting?

A. No, sir.

Q. 34. It was an established business?

A. Yes, sir. They were already in for some years previous to that.

Cross-examination by Mr. MORRILL:

X Q. 35. You say that you commenced with the predecessor of this firm in 1859?

A. Yes, sir.

X Q. 36. Where did you live at that time?

A. I couldn't say, sir; I boarded; I was boarding then; I couldn't place in what place; I changed around occasionally as you know a man will in those days and had been boarding in different places—let me see——

X Q. 37. I wish you would name the various firms that have had this business that you have testified to starting in with the firm that had the business at the time you went to work for them down to the present time?

A. Well, of course my recollection—you know I have been with the house for so many years and of course I took no notice what years it was; one of the concerns were simply T. A. Morison & Hoyt to begin with, and then later on, Morison Son & Hoyt, Morison Son & Hutchinson; then Hutchinson, Pierce & Company. You see I can't place it; there might be a little change, but that is the changes they made, may have been made different, but the same concern, only simply that at the time the old gentleman took his son in; I can't place how it read. I didn't take any notice to it; that is can't keep track of it in fact.

74 X Q. 38. Which firm name succeeded T. A. Morison & Hoyt?

A. Morison Son & Hoyt as close as I recollect.

X Q. 39. At what time did they succeed them?

A. Oh, that I couldn't place, the year. I couldn't place the year. I couldn't give that.

X Q. 40. Did you work for Morison, Son & Hoyt?

A. Yes, sir.

X Q. 41. Where were you living at that time when you worked for Morison Son & Hoyt?

A. I was living in New York, boarding.

X Q. 42. Whereabouts in New York?

A. I boarded several places.

X Q. 43. Well, but where were you boarding, I am trying to find out what kind of a memory you have got?

A. I have got a good memory, but on matters of that kind they have passed out many years. I boarded in Wooster street, one place.

X Q. 44. How long ago was that?

A. That is in the neighborhood I should think probably—I can't place the year exactly; I couldn't place the year.

X Q. 45. How old a man are you?

A. 67.

X Q. 46. How old were you when you went to word for T. A. Morison & Hoyt?

A. That I couldn't tell you, sir. I came to this country a boy and I had not as clear a record of my age.

X Q. 47. How old do you think you were at the time you went to work for them?

A. Well, by giving my age now what it is— I am not much at figuring as to the years I have been there.

X Q. 48. I don't ask for that. I want you to tell from your memory how old you were when you went to work for these people?

A. I couldn't place the year.

X Q. 49. You can't remember that?

A. If I thought the matter over previous to coming here I could, thought the matter over to say that; I couldn't get at the very year.

X Q. 50. You have thought over the matter of the trade

75 mark, I suppose?

A. It wasn't necessary at all.

X Q. 51. That wasn't necessary?

A. No, sir; that I have got clear in my head.

X Q. 52. How old were you when you came to this country?

A. That is one of the remarks I made to you that I couldn't place a few minutes ago; I have no recollection of my exact age.

X Q. 53. Then when you say you are 67 years old you are simply guessing at it?

A. No.

X Q. 54. You know you are 67?

A. I know I am 67.

X Q. 55. How did you find that out if you don't have any record of your age when you came here?

A. That I have taken from the best of my knowledge; one of my friends told me, and I have taken out some insurance, and in order to be exact as I could I thought as close as I could.

X Q. 56. Were you 20 years old when you went to work for them?

A. I presume I was about that probably.

X Q. 57. You presume you were about that?

A. I would not give the very exact age.

X Q. 58. Well, judging from your size?

A. Judging by my size I was that. I was a strong and healthy boy and I recollect of the duties I had to do. I was strong enough to do it, and just a strong boy, but what exactly my age was, I couldn't say.

X Q. 59. Do you know if you are 67 years old and went to work for these people in 1849, you were only nine years old?

Mr. Cox: I object to that as misleading.

A. I didn't say in 1849, did I.

X Q. 60. That is my recollection of it, what was it? What is the date?

A. 1859.

X Q. 61. What firm succeeded Morison Son & Hoyt?

A. Morison Son & Hutchinson.

X Q. 62. Did you work for that firm?

A. Yes, sir.

76 X Q. 63. Where did you live at that time?

A. The closest where I could place that is where I used to go to lunch.

X Q. 64. I don't care where you lunched. I want to know where you lived?

A. I lived in Pearl street; corner of Frankfort and Pearl.

X Q. 65. Did you live there all the time that the firm was Morison Son & Hutchinson?

A. That I couldn't tell you; I couldn't tell you that. I occasionally moved around, not very often, but I recollect of my going to lunch there down the street, and the way I went was as close as I recollect that placed it I boarded there at that time.

X Q. 66. How many years was the firm Morison Son — Hutchinson?

A. That I couldn't place. I kept no track of that, and of course I had no notice to it; no record of it at all.

X Q. 67. But you can remember the Star brand, can you?

A. I can remember going there, the Star brand and working for the Star, for each of the concerns as they made the change; it was immaterial to me who came in; it didn't make any difference to me, but what year and what parties was into it, it didn't made any difference, so I couldn't place the year they made the change.

X Q. 68. You have got a pretty good memory on one point?

A. I have got a fair memory on almost everything as close as I think myself; that is to say I have got a good memory; there is nothing the matter with my memory; I have no object in telling any statement only what is exactly so.

X Q. 69. You are still working for the firm, aren't you?

A. Yes, sir; I have no object in telling any matter only what is just right as it happens.

X Q. 70. You say that in 1859 the goods were marked with a Star?

A. Yes, sir.

X Q. 71. What kind of a Star were they marked with?

A. Same size star as they are marked with to-day.

X Q. 72. I want you to describe the star?

A. Six pointed star.

77 X Q. 73 What were the characteristics; describe the Star.

A. I can draw you—

X Q. 74. No, just describe it?

A. I can't; a six pointed star; I will show you about the size.

X Q. 75. I don't care anything about the size; simply describe the star just in words. Tell me what sort of a star it was?

A. I am satisfied to prove the star was then as it is to-day, and about that size you know. We have it in the book there to show, and I am satisfied to prove that is the same star and about the same size.

X Q. 76. Was it a solid star or was it made with simply a mark around the outside?

A. It was a solid star made on the shirt; printed on the shirt.

X Q. 77. Solid star?

A. What do you call a solid star?

X Q. 78. Was the star one color all over or was it simply made one star around the outside?

A. It was one color; the star is one color.

X Q. 79. All over?

A. Star shirt; whether the star differed in size or not, then, of course, that I couldn't tell. It was never necessary for me to know.

X Q. 80. Didn't you say if you tried to remember what the star looked like before you couldn't do it?

A. It was a star then as it is now.

X Q. 81. But you can't remember what it looked like then?

A. Simply that it was a star.

X Q. 82 (X Q. 81 repeated.) A.Yes, sir.

X Q. 83. And it was the same star you use now?

A. The same star we use now.

X Q. 84. I hand you Complainant's Exhibit Shirt Label and ask you if your trade mark Star looked like that in 1859?

A. I would not think so.

X Q. 85. You wouldn't think so?

A. No.

X Q. 86. (Turning exhibit over.) Did it look like that?

A. Mightn't have been as red as that, but the same description of a star.

X Q. 87. Same description of a star?

A. Yes, sir.

X Q. 88. Would you call that the same color, solid all over, or simply a mark around outside?

A. You mean red color.

78 X Q. 89. That star?

A. I would call that red color.

X Q. 90. Same color all over?

A. Not the same as that; that material it is made on.

X Q. 91. I am talking about the star; is that star red all over or is it a mark around the outside?

A. I don't understand what you mean, red all over. It is the same star; the star is just the same all around as far as I can see.

X Q. 92. The same star that was used in 1859?

A. Yes, sir.

X Q. 93. I hand you Complainant's Exhibit Box Label and ask you if the star that is shown there is the same as used in 1859?

A. That star is in a larger form, but it is the same, but in a larger form on the label; it is the same star.

X Q. 94. You testified that before the war the firm had a large trade in the south?

A. Yes, sir.

X Q. 95. And some scattering trade through parts of the country?

A. Oh, yes, sir.

X Q. 96. Did the beginning of the war stop the Southern trade?

A. Yes, sir; that is at the time of the blockade; previous to the blockade this concern sent a great many goods down to their customers thinking as a great many others did that the war wouldn't amount to any war; they sent a number of their goods down to these customers and provided them for the time being as they supposed, that it would only simply be no war at all. Then as soon as the blockade came, of course they stopped sending any more goods.

X Q. 97. Did the firm after the war have a large trade in the South?

A. Oh, yes, later on, yes, sir. Yes, they have had a very large trade; salesmen travelled there and they had a large tarde there.

X Q. 98. Immediately following the war did they have a large trade in the South?

A. Well, as soon as the war was settled they picked up the trade a good deal there, for their shirts were known there, and there was a great many people that was alive then would use nothing
79 else only the Star. There is a concern today, a gentleman named Mr. Levy that had been down south then. He was then in the business of L. P. Levy & Company, Mobile, Alabama, and he was up in New York today, and he told all his friends after the war to use the Star, and to do whatever they could to build it up, for it was the only first class article that there was. My statement is simply straighforward; of course, I cannot place it, but it is a straightforward thing; just simply to tell what I know.

X Q. 99. Have you ever since 1859 been doing as you say taking the goods fro mthe shelf and then packing them?

A. Yes, sir; I have been taking goods from the shelf and after they were charged probably to unpack.

X Q. 100. Have you done all that work that has been done?

A. No, sir; there have been other parties. I couldn't get them out and ship them.

X Q. 101. How did the business of the firm in 1859 compare with the business of the firm now?

A. Well, to my knowledge there wasn't such a variety of goods, but they have had a fine grade of goods and were doing a large business then; not so many qualities. There were only a few lots, chiefly white shirts then, as close as I recollect; not so many negligees as used today.

X Q. 102. How about the volume of the business; did they have as big a business then as they do now?

A. No, I don't think so; no, oh, no, but they were considered the leading house in that line of business in the City of New York.

X Q. 103. Has this firm ever used any other form of star than the one shown on this label—any other form, now?

A. Not to my knowledge.

X Q. 104. Have they ever used one made up in any other way? I am not talking about size now, but any different design?

A. No, sir: that is the only star they ever made up, to my knowledge. I would know pretty well if they did. I would see it on their goods.

80 BARRY C. DAVIDSON, called and sworn as a witness on behalf of the complainant, testified as follows:

Direct examination by Mr. Cox:

Q. 1. Please state your name, age, residence and occupation?

A. Harry C. Davidson; 20 West 25th street; 37 years; salesman for Hutchinson, Pierce & Company.

Q. 2. What is the business of Hutchison, Pierce & Company to whom you refer?

A. What do you mean, what is their business?

Q. 3. What do they do?

A. Manufacture shirts.

Q. 4. When did you become associated first with that business?

A. 1890.

Q. 5. Under what name was the business then carried on?

A. Hutchison, Pierce & Company.

Q. 6. Do you know whether it was then incorporated under that name or not?

A. It wasn't incorporated then, no, sir.

Q. 7. At that time it was a firm, was it?

A. Yes, sir, Mr. Hutchinson and Mr. Pierce were both alive.

Q. 8. Do you remember when it was incorporated?

A. No, I do not. I remember about the time.

Q. 9. It has been the same business, however, ever since you have been connected with it?

A. Yes, just the same.

Q. 10. Prior to your connection with Hutchinson, Pierce & Company, were you engaged in any employment which brought you into contact with the goods?

A. Yes, sir.

Q. 11. Sold by that company—made by that company?

A. Yes, sir, I was four or five years, I don't remember which, with Wechsler & Abraham of Brooklyn, now Abraham & Straus, in the men's furnishing department, and they handled the Star shirt there.

Q. 12. And they are a large department store of Brooklyn?

A. Very large.

Q. 13. And did they handle the Star shirts?

A. Yes, exclusively, practically.

81 Q. 14. All the time you were connected with them?

A. All the time; customers would come in and ask for Star shirts.

Q. 15. Since you have been connected with Hutchinson, Pierce & Company, what have been your duties; won't you state fully what you do?

A. I travelled on the road and sold all the goods I can.

Q. 16. And where have you travelled for Hutchinson, Pierce & Company?

A. Well, I have travelled—my regular trip was formerly New England and the Middle West; then at different times when other men have been ill, I have covered the entire South, most of the south; then I took care of the coast for five or six years; so I have covered the whole country for them.

Q. 17. You refer to the Pacific coast?

A. Yes, Pacific coast.

Q. 18. You say while you were connected with the firm of Abraham & Straus, customers would come in and ask for Star skirts; was that a frequent occurrence?

A. Oh, yes, very.

Q. 19. And that was the way that the shirts you sold there were bought and sold, was it, by that name?

A. Yes, all marked in those days with the same red star you see there.

Q. 20. This same red star that appears on the Exhibit Shirt Label?

A. Yes, we have men's shirts, boy's shirts and boys' waists.

Q. 21. And a variety of styles of each, I suppose?

A. Yes, all marked with that mark; sewed on.

Q. 22. According to your experience in travelling how have the shirts been known and sold?

A. The Star shirt.

Q. 23. Have you ever during all your experience encountered any shirt not made in the business now owned by Hutchinson, Pierce & Company bearing the figure of a star with the exception of those of the defendant in this case?

A. No; I have never seen any.

Q. 24. What position, according to your experience, has
82 the Star shirt held in the trade during your experience?

A. First class.

Q. 25. Has it been the leading shirt?

A. That is pretty hard to say; it has been one of the leading shirts; of course, I think it is the leading shirt; but I know it was one of the leading shirts.

Q. 26. Can you mention some of the other leading shirts which you have encountered on the market?

A. Yes, the Manhattan shirt and the Monarch—those are about the only shirts that amount to anything that are sold under trade marks. Really there is only one other that amounts to anything. Take the Monarch shirt, they have two trade marks; I would say there are only two first class houses, that is the Star shirt and the Manhattan shirt, that use emblems or trade marks.

Q. 27. The others use the firm name?

A. Well, they do, yes, to a certain extent. There are some houses that use emblems or so forth or words to act as a trade-mark, don't you know, but the two leading makes I think which are recognized by the trade are the Star shirts and the Manhattan shirts.

Q. 28. And that has been so throughout your experience?

A. Always, yes, sir.

No cross-examination.

GEORGE STITT BROWN, recalled:

Direct examination by Mr. COX:

Q. 1. Mr. Brown, you have already testified in this case, I believe, have you not?

A. I have.

Q. 2. And you stated among other things that you have been with the business now carried on by the corporation of which you are president since 1869, as I recall it, did you not?

A. I have, yes.

83 Q. 3. Will you kindly state, if you know, the names of the various firms or corporations which have owned and conducted the business since you have been connected with it?

A. When I went with them the firm was then Morison Son & Hutchinson; it after became Morison & Hutchinson; then it became Hutchinson, Pierce & Company, a firm, and afterwards Hutchinson,

Pierce & Company, an incorporation. I have simply stated the various titles of the organization since I have been connected with it. I don't suppose you care to hear what went before; that, of course, I could tell you from what I have been told.

Q. 4. Do you recall whether the firm of Hutchinson, Pierce & Company was composed of Gardiner S. Hutchinson, Henry B. Pierce, Ira Cole and Thomas S. Morison?

Mr. MORRILL: Question objected to as leading.

A. I do.

Q. 5. Do you recall who the firm of Morrison Son & Hutchinson was composed of?

A. I do.

Q. 6. Who were they—who were the partners?

A. Thomas A. Morrison, Thomas H. Morrison, and Gardiner S. Hutchinson.

Mr. COX: Complainant's counsel offers in evidence certified copy of a decree of the United States Circuit Court for the District of Connecticut in Morison Son & Hutchinson vs. Case & Rathbun, made and entered in the April term, 1872, and also a certified copy of the decree of the Circuit Court of the United States for the Northern District of Illinois, Northern Division in the case of Hutchinson, *et al.*, vs. Blumberg, made and entered June 11, 1892.

Mr. MORRILL: Counsel for defendant objects to the receipt of the offered documents in evidence for the reason that said documents are not exemplified as required by the statutes of the United States and the rules of practice of the United States Courts.

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The same are marked "Complainant's Exhibits Case Decree and Blumberg Decree, February 14, 1907, J. A. S., Ex'r."

Mr. MORRILL: The documents having been received in evidence and marked, counsel for Joseph Loewy hereby gives notice that at the proper time he will move to have such documents stricken from the files.

Q. 7. Do you recall that when the business was conducted by the firm of Morison & Hutchinson price-lists were issued?

A. I do.

Q. 8. Can you produce specimens of such price lists?

A. You have them in your hand. I made a practice of collecting these from the first time they issued price lists; that is my own collection you have in your hand.

Q. 9. Can you state when those seven price lists were issued and distributed?

A. I can: February 1, 1876; February 1, 1877; February 1, 1878; January 15, 1879; January 11, 1880; August 1, 1882; July 1, 1883.

Mr. COX: Complainant's counsel offers in evidence price list of February 1, 1876, referred to by the witness and it is agreed that the front and back outside covers of the price lists for 1877, 1878, 1879, 1880 and 1882 are the same as those of the price list of 1876 and that

they may be referred to the same as if said covers were offered in evidence.

Marked "Complainant's Exhibit Morison & Hutchinson Price List, Feb. 14, 1907, J. A. S., Ex'r."

Q. 10. You stated that the complainant and its predecessors since you have been connected with them have been diligent in
85 asserting its rights to its trade mark. I show you a circular: Will you kindly state if you recognize it and if so what is and what was done with it?

A. I do recognize it, and it was a caution to the trade regarding the infringement of our trade marks, saying that we had already commenced a suit against a house in Chicago and we warned others and we published a note from our attorney, Col. Watson, at that time, and this was mailed to the trade and circulated in other ways.

Q. 11. Can you state about when it was first circulated, as you have testified?

A. The letter was dated June 15, 1889; but I can't tell at this late day just what date it came from our printers, or just what day it was printed. It was circulated immediately thereafter.

Q. 12. Sometime in 1889?

A. Yes, sir.

Mr. Cox: I offer it in evidence.

Marked "Complainant's Exhibit Caution to the Trade, February 14, 1907, J. A. S., Ex'r."

No cross-examination.

88

TRADE-MARK.

No. 51,146. REGISTERED APR. 3, 1906.

HUTCHINSON, PIERCE & CO.

SHIRTS, SHIRT WAISTS, AND BLOUSES.

APPLICATION FILED APR. 22, 1905.

No. 182. N.P. & Co. } p88 & Lowry

STAR

WITNESSES:

Gustav Dietrich

Edwin A. Whitfield.

Hutchinson, Pierce & Co PROPRIETOR

BY Phelps & East

ATTORNEYS

86 & 87 EXHIBITS.

89 UNITED STATES PATENT OFFICE.

HUTCHINSON, PIERCE & CO., OF NEW YORK, N. Y.

Trade-mark for Shirts, Shirt-waists, and Blouses.

Statement and Declaration.

No. 51,146. Registered April 3, 1906.

Application Filed April 22, 1905. Serial No. 2,710. Used Ten Years.

Statement.

To all whom it may concern:

Be it known that the Hutchinson, Pierce & Co., a corporation duly organized and existing under and by virtue of the laws of the State of New York, having an office for the transaction of business at Nos. 842 and 844 Broadway, New York city, in said State, has adopted for its use a trade-mark, of which the following is a description.

The trade-mark consists of the word "STAR" and a representation of a star, used singly or together.

The trade-mark has been continuously used in the business of said corporation by it and its predecessors in business, from whom it derived title, since the year 1851.

The class of merchandise to which the trade-mark is appropriated is clothing, and the particular description of goods comprised in said class upon which said trade-mark is used is shirts, shirt-waists, and blouses.

The trade-mark is usually displayed on the articles themselves by being stamped thereon or affixed by means of a ticket sewed to the garments in which the mark is woven or upon which it is stamped or printed and upon the packages or receptacles containing the goods by placing thereon printed labels on which the mark is shown.

HUTCHINSON, PIERCE & CO.,
By GEORGE S. BROWN, *Treas.*

Witnesses:

CHARLES HENRY PHELPS.
ARCHIBALD COX.

(Here follows diagram marked p. 88.)

Declaration.

STATE OF NEW YORK,
County of New York, ss:

George S. Brown, being duly sworn, deposes and says that he is the treasurer of Hutchinson, Pierce & Co., a corporation, the applicant named in the foregoing statement; that he believes that the foregoing statement is true; that he believes said corporation is the owner of the trade-mark sought to be registered; that no other person, firm, corporation, or association, to the best of his knowledge and belief, has the right to use said trade-mark, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that the said trade-mark is used by said corporation in commerce among the several States of the United States, and particularly between New York and Massachusetts; that the description, drawing and facsimiles presented truly represent the trade-mark sought to be registered; and that the mark has been in actual use as a trade-mark of the applicant, or its predecessors from whom it derived title, for ten years next preceding the passage of the act of February 20, 1905, and that, to the best of his knowledge and belief, such use has been exclusive.

GEORGE S. BROWN.

Subscribed and sworn to before me this 20th day of April, 1905.
[L. S.] WALTER H. UNDERWOOD,
Notary Public, New York County, N. Y.

90 & 91 COMPLAINANTS' EXHIBIT BOX LABEL. Oct. 17, 1906.
J. A. S., Ex'r.

DARK PAGE BL

92 COMPLAINANTS' EXHIBIT SHIRT LABEL. Oct. 17, 1906. J. A. S., Ex'r.

93 COMPLAINANTS' EXHIBIT DEFENDANTS' SHIRT. J. A. S., Ex'r. Oct. 17, 1906.

This Exhibit consists of a shirt having upon the inside portion of the yoke a woven label in red like the following:

94 COMPLAINANTS' EXHIBIT DEFENDANTS' BILL. Oct. 17, 1906. J. A. S., Ex'r.

The Busy Store Co., Inc.

Fairfield Ave. and Middle Street.

Dept. E — Bridgeport, June 26, 190
Name F. H. E.
Address
Sold By 2 — Am't Rec'd 1—

Shirt 50

27
C — C

ED THRU

95 COMPLAINANTS' EXHIBIT DEFENDANTS' ADVERTISEMENT. Oct. 18, 1906. J. A. S., Ex'r.

[From the HABERDASHER of October, 1903.]

Established 1870

"Bon Ton" TRADE MARK "Comet"

SHIRTS

NOVELTIES

OUR SPECIALTY!

SAMPLES SUBMITTED UPON APPLICATION

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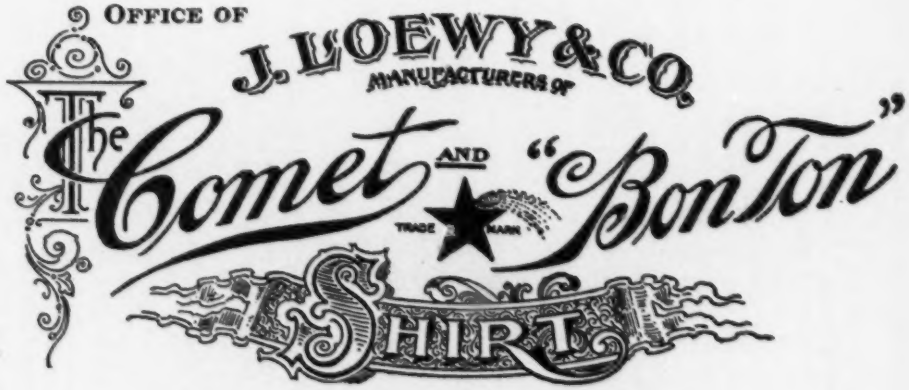

TELEPHONE:
3012 FRANKLIN.

50 LISPENARD STREET, NEAR BROADWAY.

New York, _____

97 COMPLAINANTS' EXHIBIT CASE DECREE. Feb. 14, 1907. J. A. S., Ex'r.

UNITED STATES OF AMERICA,
District of Connecticut, ss:

I, Richard F. Carroll, Deputy Clerk of the Circuit Court of the United States for the District of Connecticut, do certify that the annexed paper is a true copy of the original Decree in Morrison, Son & Hutchinson vs. Case & Rathbun, No. 172 Equity recorded and on file in said Court.

In testimony whereof, I have set hereto my name officially and the Seal of said Court, at Hartford, in said District, this 6th day of February, A. D., 1907.

R. F. CARROLL,
Deputy Clerk.

United States Circuit Court, District of Connecticut, April Term, 1872.

MORISON, SON & HUTCHINSON
vs.
CASE & RATHBUN.

This case having been brought to a final hearing upon the pleadings and proofs, and counsel for respective parties having been heard and the same having been duly considered by the Court; it is found and hereby ordered, adjudged and decreed that the plaintiffs have the exclusive right to the use of their trade-mark; that their
98 said trade-mark is a lawful trade-mark; that the plaintiffs have complied with the requirements of the Act of Congress in relation to trade-marks and are entitled to protection; as is more fully set forth in the opinion of the Court rendered in this case hereunto annexed and made part of this decree; and this Court doth order that a perpetual injunction be awarded to restrain the defendants and each of them, their servants and agents from any use of the words "the Star Shirt," or of the words "the Star Shirt" with the device of a six-pointed Star used in connection therewith; or of the words the Shirt, with the star between them; either in the identical form in which said trade-mark is registered in the patent office, as appears more fully in said opinion made part hereof, or in any form in which it may be calculated to deceive by confounding the goods manufactured and sold by the plaintiffs with shirts made and sold by the defendants.

Defendants to pay plaintiffs' costs of suit to be taxed by the Clerk under the direction of the Court.

WM. D. SHIPMAN, *Judge.*

DARK PA

99 U. S. Circuit Court, District of Connecticut. In Equity.

THOMAS A. MORRISON, GARDNER S. HUTCHINSON, THOMAS H. MORRISON, Partners under the Name of Morrison, Son and Hutchinson,
vs.
JULIUS A. CASE and JULIUS C. RATHBUN, Partners under the Name of Case & Rathbun.

Opinion.

SHIPMAN, *J.*:

This was a bill in equity praying for an injunction to restrain the defendants from using a certain trade-mark upon men-' and boys' shirts. Both firms are shirt manufacturers, selling their goods in the general market. The plaintiffs and their immediate predecessors have been engaged in the manufacture and sale of this class of goods for many years during which the business has grown to a considerable magnitude. For twenty years they have used the trade-mark in question, by stamping or labelling the same upon the shirts manufactured and sold by them and upon their packages and advertisements. In March, 1871, the plaintiffs caused this trade-mark to be registered in the Patent Office at Washington under the Act of Congress approved July 8, 1870, which provides "That any person or firm, domiciled in the United States, and any corporation created by authority of the United States, or of any State or Territory thereof, and any person, firm, or corporation resident of or located in any foreign country, which by treaty or convention affords
100 similar privileges to citizens of the United States, and who are entitled to the exclusive use of any lawful trade-mark or who intend to adopt and use any trade-mark for exclusive use in the United States, may obtain protection for such lawful trade-mark by complying with the following requirements, to-wit:—

First. By causing to be recorded in the patent office the names of the parties and their residences and place of business, who desire the protection of the trade-mark.

Second. The class of merchandise and the particular description of goods comprised in such class, by which the trade-mark has been or is intended to be appropriated.

Third. A description of the trade-mark itself, with *fac similis* thereof, and the mode in which it is intended to be applied and used.

Fourth. The length of time, if any, during which the trade-mark has been used.

Fifth. The payment of a fee of twenty-five dollars, in the same manner and for the same purpose as the fee required for patents.

Sixth. The compliance with such regulations as may be required by the Commissioner of Patents.

Seventh. The filing of a declaration under oath of the person, or some member of the firm or officer of the corporation, to the effect that the party claiming protection for the trade-mark has a right to the use of the same, and that no other person, firm or corporation has the right to such use, either in the identical form or having such

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near resemblance thereto as might be calculated to deceive, and that the description and *fac similis* presented for record are true copies of the trade-mark sought to be protected." (Stats. at Large, Vol. 16, pp. 210, 211.)

The trade-mark in question, as appears by the certificate of the Commissioner of Patents, and the *fac similis* filed in his office in conformity to the Act of Congress, consists of the words, "The Star Shirt," also the words "The Star Shirt" with the device of a
101 six-pointed Star used in connection therewith; and also the words "The Shirt" with the star between them; either one, or all, being used as convenience requires.

Though this device or mark is in part arbitrary and to that extent would have no natural or necessary significance in connection with the article manufactured apart from its use in that connection, yet, by such use of the plaintiffs in connection with their manufacture and sale of these articles it has become well known to the trade, and has come to be taken by dealers as a peculiar designation by which the plaintiffs's goods are distinguished in the market. It is therefore both in its character and use, when taken together, a lawful trade-mark. It has long been employed by the plaintiffs and well understood by dealers, and the public, as designating such articles of their manufacture. They have complied with the requirements of the Act of Congress, and are entitled to protection. Their exclusive right to the use of this trade-mark is co-extensive with the limits of the United States.

The defendants have clearly infringed this right by using the words and device of the plaintiffs, both in the exact form and in such near resemblance as is calculated to deceive. They have done this by so marking the shirts made by them, and by the labels used on their packages and packing boxes. A perpetual injunction must therefore issue restraining them from any use of this trade-mark, either in the identical form in which it is registered in the patent office, or in any form in which it may be calculated to deceive by confounding the goods manufactured and sold by the plaintiffs with shirts made and sold by the defendants.

102 COMPLAINANTS' EXHIBIT BLUMBERG DECREE. Feb. 14/07.
J. A. S., Ex'r.

In the Circuit Court of the United States, Northern District of Illinois, Northern Division.

SATURDAY, *June 11th*, 1892.

Present: Honorable Henry W. Blodgett, District Judge.

21432.

GARDINER S. HUTCHINSON, HENRY B. PIERCE, IRA COLE, and THOMAS S. MORISON,
vs.
JACOB J. BLUMBERG.

This cause having come on to be heard upon the bill of complaint, and the answer of the defendant, and the proofs produced both by the complainants and the defendant including the exhibits produced by both the complainants and defendant and marked herein, and received in evidence, and after hearing B. F. Watson of counsel for the complainants and Elbert C. Ferguson of counsel for the defendant. Now, on consideration thereof, it is hereby ordered, adjudged and decreed, and this Court doth hereby order, adjudge and decree as follows, to-wit:

That the complainants, and their predecessors in business and assignors having their residence and their principal place of business in the City of New York, in the State of New York, have continuously, and since the year 1859, employed as their device and trade-
103 mark to designate their manufacture of shirts, waists, underwear and furnishings manufactured by them, and their ownership therein, the word or designation of a "Star" together with the form and symbol of a star, to represent said word "Star", and also so employed the words "The Star Shirt" and a device of a star in the place of said word "Star" thus "The * Shirt" and also so employed the word "Star" and the device of a star, singly or together, in connection with shirts, waists, underwear and furnishings, plainly marked, written, stamped, printed or placed upon each of said shirts, waists, underwear and furnishings manufactured by them; and also used the same in and upon pictures and drawing- of said shirts, waists, underwear and furnishings, and in advertisements and on boxes, signs, packages and circulars issued by them, and used in their said business.

That the said devices and trademark are in all respects valid as a trademark; and the complainants, constituting the firm of Hutchinson, Pierce & Co. are the owners thereof and entitled to their exclusive use, and are also entitled to all damages accruing to them by reason of the infringement thereof by the defendant, since the beginning of such infringement.

That the defendant residing in and having his principal place of

business in the City of Chicago and State of Illinois has infringed upon the complainants' said devices and trademark; and has for many years used the said word "Star" in connection with the word "Crescent" thus "Star and Crescent Shirtwaist", and has also used the said device or symbol of a Crescent, as a trademark, in violation of the said Complainants' said devices and trademark; and has used the same for the purpose of deceiving purchasers and customers of the Complainants' Shirtwaists, underwear and furnishings, with the belief that the said waists, etc., bearing his trademark were the waists, etc., of the Complainants.

Therefore it is further ordered, adjudged and decreed that the said Complainants do recover of the said defendant the gains,
104 profits and advantages which the said defendant has made or received, or which have accrued to him from the said infringement as aforesaid.

And it is further ordered, adjudged and decreed that the Complainants do recover of the said Defendant their costs, fees, charges and disbursements in this suit to be taxed.

And it is further ordered, adjudged and decreed that unless the Defendant within twenty days from the signing and filing of this decree, file a consent that the amount of such gains, profits and advantages, and the amount of damages suffered by the Complainants by reason of such infringement, shall be entered up in the final decree herein in the sum of $250.00 then this matter be, and hereby is referred to E. B. Sherman, Esq., one of the Masters of this Court to ascertain and determine and report to this Court an account herein, and the number and value of Shirts, Waist-, Underwear or Furnishings infringing the Complainants' said devices and trademark made or sold by the said defendant and the profit received by the defendant therefrom and of all damages suffered by said Complainants by reason of such infringement from the beginning of such infringement.

And it is further ordered, adjudged and decreed that the said Complainants on the accounting above mentioned have the right to cause an examination of said defendant, and also the production of all books, vouchers and documents of said defendant, relating to the manufacture or sale of the Shirts, Waists, Underwear and Furnishings made or sold by the defendant, and infringing the Complainants' devices and trademark as aforesaid; and that said defendant shall attend for that purpose before said Master from time to time as he shall direct.

And it is further ordered, adjudged and decreed that a perpetual injunction be issued out of this court against said Defendant Jacob J. Blumberg, restraining and enjoining him, his agents, clerks, servants and workmen, and all holding under or through
105 them from making, using or selling, or offering for sale Shirts, Waists, Underwear and Furnishings bearing the trademark, or distinguishing mark, consisting of the device or symbol of a Star or the word "Star" used singly or together, or used singly or together with the word "Crescent" or device or symbol of a crescent, or with any other word or device or symbol whatever, and from

selling or offering for sale Shirts, Waists, Underwear and Furnishings manufactured by or for said defendant, as the "Star" Shirts, Waists, Underwear and Furnishings, or as and for the Shirts, Waists, Underwear and Furnishings made by these Complainants.

UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division, ss:

I, Marshall E. Sampsell, Clerk of the Circuit Court of the United States, for said Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete copy of the order entered of record in said Court on the 11th day of June A. D. 1892, in the cause wherein Gardiner S. Hutchinson, *et al.*, are the complainants, and Jacob J. Blumberg is the Defendant, as the same appears from the original files and record in said cause now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Chicago, in said District, this 8th day of February A. D. 1907.

[SEAL.] MARSHALL E. SAMPSELL, *Clerk.*

106 COMPLAINANTS' EXHIBIT MORISON & HUTCHINSON PRICE LIST. Feb. 14, 1907. J. A. S., Ex'r.

The following is a fac-simile of the cover or first page:

107 COMPLAINANTS' EXHIBIT CAUTION TO THE TRADE. Feb. 14/07. J. A. S., Exr.

Caution to the Trade.

We have found it necessary to commence a suit against a prominent house in Chicago for the infringement of our Trade-Mark, and to warn a prominent house in St. Louis that suit will be immediately commenced against it, unless prompt satisfaction is made.

This unusual and disagreeable necessity creates an appropriate opportunity for issuing this warning to the Trade, including Manufacturers, Sellers and Buyers. It is well known throughout the Trade in this country, and almost universally acknowledged, that our firm owns and uses a Trade-Mark which it and its predecessors have owned and used for more than 40 years, and the right to which is very valuable. That Trade-Mark consists of a Star, to designate that we are the makers and sellers of the Star Shirts, Waists, Underwear, and Furnishings to which it is attached. It comprehends the word "Star," and the device or symbol of a Star used, singly or together, in connection with our Shirts, Waists, Underwear, and Furnishings, or in connection with the boxes or other packages used for containing the same, or in connection with our advertisements, circulars, and other publications relating to the same. We have determined to punish any infringement of this Trade-Mark. Almost without exception, the Trade for many years have respected our rights, but the superior and reliable quality of our goods bearing our Trade-Mark has become so well known and appreciated as to offer inducements for counterfeiting our Trade-Mark, which in a few instances have been availed of for imposing upon purchasers.

108 We herewith publish the following note from our Attorney:

"18 BROADWAY, NEW YORK, *June* 15, 1889.

"Mess. Hutchinson, Pierce & Co., No. 836 Broadway.

"GENTLEMEN: The word 'Star,' or the device or symbol of a "Star used, singly or together, for indicating your manufacture "and ownership of Shirts, Waists, Underw-are, and Furnishings, is "a lawful Trade-Mark, and your right thereunder is protected by "the Common law and by the Statute law, both civil and criminal, "of many of the States of the Union. It is an infringement of your "rights, for any one to use in connection with such merchandise, "or the boxes or packages used for containing it, any word, mark, "sign, device, or other means, so resembling your Trade-Mark as "will be likely to induce the belief that it is your Trade-Mark.

"Yours truly,

"(Signed) B. F. WATSON."

Yours respectfully,

HUTCHINSON, PIERCE & CO.

109 In the United States Circuit Court, Southern District of New York.

HUTCHINSON, PIERCE & COMPANY, Complainants,
vs.
JOSEPH LOEWY, Respondent.

Notice of Appearance.

The respondent, Joseph Loewy, by his attorney Ira Jay Dutton, hereby enters his general appearance herein.

Dated New York, May 22, 1906.

IRA J. DUTTON,
Solicitor for Respondent,
220 *B'way, Man. Boro., New York City.*

EDWARD T. FENWICK,
Of Counsel.

110 *Notice of Taking Testimony.*

In the Circuit Court of the United States, Southern District of New York.

HUTCHINSON, PIERCE & Co., Complainants,
vs.
JOSEPH LOEWY, Defendant.

Please take notice that on the 14th day of March, 1907, at two o'clock in the afternoon of that date, I shall, at the office of John A. Shields, Esq., at the Post Office Building, in New York City, N. Y., begin to examine witnesses and introduce proof on behalf of the defendant in the above entitled cause.

The examination will be conducted before John A. Shields, a Standing Examiner of this Court, or other competent officer, and will be continued from day to day until completed. You are invited to attend and cross-examine.

Dated New York, N. Y., March 9, 1907.

E. T. FENWICK,
Of Counsel for Defendant.

To Archibald Cox, Esq., Complainants' Solicitor.

Due and timely service of the above notice and receipt of copy admitted this 9th day of March, 1907.

ARCHIBALD COX.

111 United States Circuit Court, Southern District of New York.

HUTCHINSON, PIERCE & COMPANY
vs.
JOSEPH LOEWY.

Depositions of Witnesses.

Testimony on behalf of the defendant, taken pursuant to notice, under and pursuant to the 67th Rule of the Supreme Court, as amended, before John A. Shields, Esq., Standing Examiner, at his office in the Post Office Building, on Thursday, March 14, 1907, at 2 P. M.

Appearances.

Archibald Cox, Esq., for Complainant.
L. L. Morrill, Esq., for Defendant.

JACQUES NEUGASS, called and sworn as a witness on behalf of the defendant, testified as follows:

Direct examination by Mr. MORRILL:

Q. 1. Mr. Neugass, state your age, residence and occupation?
A. 64 years; residence, 718 East 140th street; occupation, embroidery business.
Q. 2. Are you acquainted with the defendant, Joseph Loewy?
A. Yes, sir, I am.
Q. 3. For how many years have you been acquainted with Mr. Loewy?
A. About thirty-eight years.
112 Q. 4. About what year did you make his acquaintance?
A. In 1870, I should judge; 1870.
Q. 5. Were you acquainted with Mr. Loewy's predecesors in business?
A. Yes, sir; I was.
Q. 6. Will you state who they were.
A. His predecessor was Leopold Loewy and Mr. Maurice Senftenberg; also Mr. Leopold Senftenberg.
Q. 7. About what date did you make the acquaintance of the predecessors of Mr. Loewy?
A. Why, I couldn't tell you that; it was in 1869, in the fall of the year; a friend of mine lived with him, you know; it was probably in October of 1869.
Q. 8. From your acquaintance, do you or do you not know whether the predecessors of Mr. Loewy adopted and used any trade-marks?
A. I do know it.
Q. 9. Will you state what trade-marks, if any, they used?
A. It was a Comet and they used it at my suggestion.
Q. 10. Will you state how early a date to your knowledge the predecessors of Mr. Loewy adopted and used the trade-mark Comet?
A. In 1873.

Q. 11. Upon what class of goods?
A. Upon shirt fronts and shirts.

Cross-examination by Mr. Cox:

X Q. 12. What did the mark to which you refer as the Comet look like?
A. Well, it was a Comet; it was a figure with a tail on it, and there was a tale to it, too.
X Q. 13. What sort of a figure?
A. Well, it was a set figure.
X Q. 14. I know, but can't you describe what the figure was?
113 A. I couldn't describe it any different, and even they used it not only in that way, but they had it also in print besides that.
X Q. 15. Can't you describe the figure that had a tail to it?
A. I can mark it for you, probably, you understand; that is all it was.
X Q. 16. Did you ever hear of the word "Star"?
A. Never. If I ever did hear of the word "Star"—if I know what Star means?
X Q. 17. Yes?
A. Of course I do.
X Q. 18. Don't that describe the figure that had a tail to it?
A. No, it doesn't, I beg your pardon, because it was distinctly different from anything like that.
X Q. 19. What was the figure that had the tail to it?
A. A star would be single, and this was not. It would be just a single figure, a star, and this was not it.
X Q. 20. This was a star with a tail to it, wasn't it?
A. No, it wasn't a star; it wasn't anywhere a star.
X Q. 21. What was it like, this figure with a tail to it?
A. It would be like a figure, you understand, with points; it doesn't seem—I haven't got it before me.
X Q. 22. You mean it didn't have any points as a star has?
A. I don't think it was exactly like that.
X Q. 23. Some sort of nebulous matter?
A. Something of that order.
X Q. 24. Circular?
A. Representing a comet.

Redirect examination by Mr. MORRILL:

R. D. Q. 25. Did this figure which was the head of the comet have some points on the outside?

114 Mr. Cox: Objected to as already answered.

A. It was not exactly pointed, you know; it was not in the form of a star; it was a comet.

LEOPOLD SENFTENBERG, called and sworn as a witness on behalf of the defendant, testified as follows:

Direct examination by Mr. MORRILL:

Question 1. State your age, residence and occupation?

Answer. 63; residence, 1184 Madison avenue; occupation, shirt waists.

Q. 2. Are you acquainted with the defendant Joseph Loewy?

A. I am, sir.

Q. 3. At about what date did you make his acquaintance?

Q. It was in the spring of 1871.

Q. 4. Were you or were you not acquainted with the predecessors of Mr. Loewy?

A. I was: I was one member of the firm.

Q. 5. Will you state the several predecessors of Mr. Loewy in business?

A. Leopold Loewy, my uncle Moritz Senftenberg and myself.

Q. 6. Can you state the several names of the parties and firms in the order in which they did business from the beginning of the business down to the present defendant?

A. Well, there was Leopold Loewy and Moritz Senftenberg; the firm was Loewy & Senftenberg. In 1871, I came here from Cincinnati and went in their employ. Later on my uncle withdrew and Moritz Senftenberg and I went under the same style of firm. In the fall of 1878 I associated myself with my brother in business in Texas and withdrew from the firm of Loewy & Senftenberg and Joseph Loewy then entered the firm of L. Loewy & Brother.

Q. 7. The next step?

Mr. COX: That is objected to, because the witness, according to his statement, was in Texas.

115 A. I was not in Texas. I associated myself with my brother in business in Texas, but I was in New York.

Q. 8. The next step?

A. What do you mean?

Q. 9. The next change in the firm?

A. The next change in the firm, the Loewy Brothers separated, and Mr. Joseph Loewy continued the original business. His brother started a separate business.

Q. 10. Were you acquainted with any trade-marks originated and used by Mr. Loewy or his predecessors in business?

A. In the fall of 1873 we adopted the Comet. We were talking for quite a while of getting a trade-mark, and there was—and the way we came to the Comet, there is a tale, a story, connected with it which I don't think is proper to place here. That is how we came to adopt the Comet.

Q. 11. Do you know whether the trade-mark Comet was used by the several firms who were the predecessors of Mr. Loewy during their continuation in business?

A. It has been used continually by us and afterwards from the time we adopted it in 1873.

Q. 12. Do you or do you not know whether the trade-mark mentioned, the Comet, is still in use by the defendant, Joseph Loewy?
A. Yes, sir.
Q. 13. Is the trade-mark Comet, now employed by Mr. Loewy, the same or similar to the trade-mark originally adopted?

Mr. Cox: That is objected as incompetent, because it calls for secondary evidence as the mark should be produced and permitted to speak for itself.

A. Yes, sir.

116 Cross-examination by Mr. Cox:

X Q. 14. You heard Mr. Neugass' description of the mark used back in 1873 here, did you not?
A. Yes, sir.
X Q. 15. Do you agree with that?
A. Yes, sir.

WILLIAM J. WILKINSON, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. MORRILL:

Q. 1. State your age, residence and occupation?
A. My age is 50; furnishing buyer; residence, 1239 Thirty-seventh street, Brooklyn.
Q. 2. With whom, if any one, are you associated in business?
A. I am buyer for John McCormick, Fifth avenue and Ninth street, Brooklyn.
Q. 3. Does the firm with whom you are associated handle shirts?
A. Yes, sir.
Q. 4. Will you state some of the trade-marks of the shirts handled by your firm?
A. Well, we use the Lyon brand and we use the Comet; we use the Star, and we use the Sanspareil and the Owl.
Q. 5. Do you know by whom the Star shirt is manufactured?
A. Hutchinson, I believe.
Q. 6. Do you know the full name of the firm?
A. Hutchinson, Pierce & Company, I believe it is.
Q. 7. Do you know the manufacturer of the Comet shirt?
A. Yes, sir.
Q. 8. Will you state who it is?
A. J. Loewy.
Q. 9. For how many years has your firm handled the Star shirt and the Comet shirt?

Mr. Cox: That is objected to because no proper foundation has been laid for the answer.

117 A. Well, they have handled——. I have been there twelve years, and we have handled the Comet during that time. The Star shirt I believe we hadn't handled up to about three years ago, somewhere around there.

Q. 10. Do you personally sell to customers Star shirts and Comet shirts?

A. No, sir; I don't sell goods.

Q. 11. Have you occasion to be familiar with the sale of the shirts?

A. Yes, sir; I am on the floor and see the goods sold and see that the customers are waited on properly.

Q. 12. Do you know whether or not there is any confusion in the sale between the Star shirt and the Comet shirt?

A. No; not that I heard of; they are two different garments altogether.

Q. 13. What amount approximately of Star shirts and Comet shirts does your firm handle?

A. Well, we handle a great many more Comet shirts, because they are a cheaper shirt, lower price shirt. The Star shirt is a more expensive shirt, and we don't sell so very many of them; we carry a few of them. Somewhat better goods, such as Lyon brand and Sanspareil; they are higher grade. The Comet shirt is a lower priced shirt; sells around fifty cents. I believe that is all they manufacture a fifty cent shirt, if I am not mistaken.

Q. 14. Will you state, what, if anything, you know in relation to whether or not customers do or do not call for either of said shirts and receive the other instead?

A. Never in our place. A person calls for a Comet shirt and they get it; if they call for a Star shirt they get it, if we have it in stock. If not, we couldn't sell one for the other, because they are different goods.

118 Q. 15. From your observation what is your opinion as to the probability of confusion between the two shirts in the minds of buyers?

Mr. Cox: That is objected to as incompetent and immaterial.

A. You mean wholesale buyer?

Q. 16. No, retail buyers?

A. Oh, they couldn't conflict in any way that I know of at all. Then, as I said before, the Star shirt is a better grade of goods, a higher grade of goods. The Comet shirt is made from cheaper materials, and sells at a lower price. A party who wants to buy a Star shirt expects to buy a dollar or a dollar and a half shirt; a party who buys a Comet shirt don't expect to pay more than half a dollar for it; that is what they are usually sold for.

Q. 17. In your opinion, and from your observation, what is your opinion as to the liability of a customer being confused by the two trade-marks?

Mr. Cox: That is objected to as incompetent.

A. Well, I don't think they could be; I am positive they couldn't be by the two marks because they are entirely different.

Cross-examination by Mr. Cox:

X Q. 18. I understand you to say that the large majority of purchasers in the store in which you are employed come looking for the cheaper grades of shirts, is that right?

A. A majority of the people are, yes; we are in a neighborhood where we have a great many working people.

119 JOHN B. SEILER, called and sworn as a witness on behalf of the defendant, testified as follows:

Direct examination by Mr. MORRILL:

Q. 1. State your age, residence and occupation?

A. My age is 59; residence, 434 Lafayette street, Newark, N. J.; occupation, dry goods merchant.

Q. 2. As such merchant have you handled men's furnishings of any kind?

A. Yes, sir.

Q. 3. Of what kinds have you handled?

A. Handle everything in the gents' furnishing goods line; hosiery, shirts, suspenders; everything used in that line. Dry goods of all descriptions.

Q. 4. Are you acquainted with the defendant, Joseph Loewy?

A. Yes, sir.

Q. 5. Are you acquainted with the goods manufactured by him?

A. Yes, sir; we handle their shirts right along, and have for the last 32 years.

Q. 6. Were you or were you not acquainted with the predecessors of Mr. Loewy in business?

A. Yes, sir.

Q. 7. For about how long?

A. I became acquainted with him in 1874, in May; it was L. Loewy & Senftenberg at the time.

Q. 8. Did you or did you not at that time purchase goods from the firm?

A. Yes, sir.

Q. 9. Of what class?

A. Principally white shirts and those bosoms, handkerchiefs—principally shirts and bosoms; that was the principal thing at that time.

Q. 10. I hand you an article and ask you to state what it is?

A. Well, that is a boy's bosom. We used to buy them to insert them in shirts when they were worn out; that is a thing out of date now-a-days; I haven't sold a dozen, I think, in twenty years, I don't think I bought one of these—well, I think I could safely say
120 fifteen; I think I am safe on that, a boy's bosom.

Q. 11. Will you examine the article, the bosom, and state whether or not there is any trade-mark pasted thereon?

Mr. COX: Objected to as calling for a conclusion of law, and as secondary, as the article speaks for itself.

Question withdrawn.

Q. 12. Will you examine the article and state what, if any, marks, you find thereon?

Objected to as calling for secondary evidence.

A. Well, I find the marks here that were always on it. There isn't any mark here I put on. Those are all original marks on there. 1800 linen, the style is 1171. We used to buy those things in 16, 18 and 200 and 2100 linen at the time; linen bosoms; that is 1800 linen; that is what that 18 represents; what it has always been known to be.

Q. 13. Will you state further as to any marks by which you could identify the article as being of any particular manufacturer's make?

Objected to as calling for secondary evidence.

A. I can tell by this here Comet.

Q. 14. You speak of a Comet. Will you state if you know whose goods are identified by such Comet?

A. At present it is J. Loewy. I think that Comet was used as long as I can remember dealing with those firms. The successors to Loewy & Senftenberg was Leopold Loewy, and afterwards Loewy Brothers, and recently, or just now, it is J. Loewy, and as far as I can remember back the Comet label was on there when I first started business in 1874, as I remember; I think it was.

Mr. Cox: I move to strike that out as volunteered and irresponsive.

Q. 15. Will you state how many years this particular article has been in your possession?

121 A. Well, I couldn't say positively unless I looked up my bill and found out when I bought the last boy's bosom; that is the only way I can find out. I have the records; it is quite a little work to go back and look those all over. To the best of my knowledge I think at least 15 years.

Q. 16. Will you state whether or not the representation of a Comet referred to was or was not upon that bosom when bought by you?

A. Well, it was on there when I bought it.

The bosom referred to is offered in evidence and marked "Defendant's Exhibit 1, Defendant's Shirt Bosom, J. A. S., Exr., Mar. 14, 1907."

Q. 17. I believe you have testified that you sold the Comet shirt, did you not?

A. Yes, sir.

Q. 18. Have you ever known of any confusion in the minds of purchasers between the Comet shirt sold by you and the Star shirt?

Mr. Cox: That is objected to because no sufficient foundation has been laid for it.

A. No, sir. Personally I never knew anything about a Star shirt until I heard of this here; never heard of the shirt at all; never saw it.

Q. 19. Will you state as near as you can the quantity of Comet shirts handled by you?

Objected to as immaterial.

A. I can't say that positively, because the last six years I don't

run that department myself. My nephew runs that, and I couldn't say exactly what the amount of shirts is bought, but I know it is on every shirt we buy, whether negligee or stiff, or laundered or unlaundered, and we use a great many of them; I couldn't tell exactly how many shirts.

Mr. Cox: I move to strike out the whole of the deposition for reasons stated in the objection.

No cross-examination.
Adjourned subject to notice.

122 At a Stated Term of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, held at the United States Court Rooms, in the Borough of Manhattan, in the City of New York, on Wednesday, the 23d day of October in the year of our Lord one thousand nine hundred and seven.

Present: The Honorable John R. Hazel, Judge.

HUTCHINSON, PIERCE & CO.
v.
JOSEPH LOEWY.

The above entitled cause coming on for final hearing upon the pleadings and proofs, Mr. Archibald Cox is heard on behalf of the complainant.
Mr. Ira J. Dutton is heard on behalf of the defendant.

C. A. V.

An extract from the minutes.

JOHN A. SHIELDS, *Clerk.*

123 Circuit Court of the United States for the Southern District of New York.

HUTCHINSON, PIERCE & CO., Complainant,
against
JOSEPH LOEWY, Defendant.

Archibald Cox, Phelps, Evins & East, for Complainant.
Ira Jay Dutton, E. T. Fenwick, L. L. Morrill, for Defendant.

HAZEL, *J.:*

The bill charges the infringement of the complainant's trade-mark, which originated in its business of manufacturing shirts, waists and blouses, in the year 1840. The trade-mark was registered under the Act of Congress of 1905, on April 3, 1906, and consists "of the word star and the representation of a star, used singly or together." Its distinctive characteristic is the outline of a small star to represent that word signifying to the trade the high class of manufacture of complainant's articles which have become widely and favorably

known as the star shirt, star waist, etc. The asserted infringement by the defendant consists in the use of a solid star in combination with a curved tail in resemblance of a comet. The nucleus of the comet has a five-pointed star with a tail following it and the words "The Comet" are printed in black or red type over or underneath such symbol. I am of the opinion that the defendant's trade-
124 mark or brand is clearly distinguishable from that of complainant. There is no reasonable probability of the ordinary purchaser being deceived into buying the defendant's manufacture as that of complainant. The rule is well established that a trade-mark, word or symbol has the elements of a property right and may not be unlawfully used by a rival in business either alone or as an accessory to such prior appropriation and in such cases a right to injunctive relief follows without proof of confusion of proprietorship or that buyers have been actually misled by such use. But if a defendant's design or symbol is essentially different and distinguishable in appearance so that by no possibility can his article be taken for complainant's genuine production a cause of unlawful appropriation is not maintainable (McLean *vs.* Fleming, 96 U. S., 245; Liggett & Myers Tobacco Co. *vs.* Finzer, 128 U. S., 182).

The complainant's star in outline as shown by the drawing has six points and is one inch in diameter, while the defendant's star is a solid body, 7/16 of an inch in diameter, and the tail, colored red or black, is one inch long. The word "star" is not used by the defendant in combination with the symbol, but, as already mentioned, the words "The Comet" prominently appear in connection therewith. It must be conceded that a comet ordinarily has not the visible outline of a star. Its point is a formation of nebulous matter and is preceded or followed by a luminous curved train, but, nothwithstanding defendant's exaggerated point, neither upon the clothing of defendant's manufacture or on its box label is the emblem as a whole of such similarity to complainant's mark as in my judgment would warrant restraining its use in the absence of proof that confusion of goods existed or that intending purchasers had been deceived in buying defendant's article for that of complainant. The ordinary purchaser buying with reasonable caution would not on account of the brand or mark mistake the goods of the defendant for those of the
125 complainant and the visual impression received by a comparison of the two marks negatives the presumption of fraud or that deception is apt to occur from such use. Moreover, it is proven that the goods of the deferdant have been known to the public by and under the designation of "The Comet" since 1867, while the complainant and its predecessors have sold its goods by the designation of "Star" since 1840.

Attention is directed to the cases of Hutchinson *vs.* Blumberg (51 Fed. Rep., 829), and same *vs.* Covert (51 Fed. Rep., 832). In the first mentioned case the defendant's device or symbol consisted of a star and crescent in combination with the word "Star." In the opinion of the Court the star was the prominent feature in the appropriated trade-mark and because of such prominence in connection with the word star, the defendant's goods, it was decided,

were apt to become known as star goods and hence the public intending to buy complainant's manufacture would be misled into buying that of the defendant. The Court held that the crescent was merely incidental to the representation of the star. In the Covert case, which is also clearly distinguishable, the outline of a star was used with the words "Lone Star" on shirts and clothing. It is not difficult to suppose that such representations are calculated to deceive the public so that they would purchase defendant's goods under the mistaken belief that they were those of complainant.

It is thought that there is nothing in the case of Gannett *vs.* Rupert (127 Fed. Rep., 962), cited by complainant, to conflict with these views. In that case the Court held that as the publication "Home Comfort" was circulated in the same territory of complainant's paper "Comfort," which also had the words "The key to a million homes" printed on the title page, the infringement was clearly established without proof of confusion. Of course, every case
126 must be decided upon its own facts, and though the owner of a valid trade-mark has the unquestionable right to its exclusive use, and colorable imitations thereof which tend to mislead are forbidden, yet the resemblance to the original must impart to an ordinary purchaser exercising reasonable care a misleading or false impression as to the origin of the goods he is buying. In this case the words "The Comet" used to advertise defendant's goods, and which are prominently printed in connection with the symbol, materially differentiate the star trade-mark in suit and I think negative the inference of colorable imitation which otherwise might be considered clearly established. In support of the views herein expressed reference is made to the following adjudications: McLean *vs.* Fleming, *supra;* Liggett & Myers Tobacco Co. *vs.* Finzer, *supra;* Kann *vs.* Diamond Steel Co., 89 Fed. Rep., 706.

The bill is dismissed, with costs.

(Endorsed:) Circuit Court of the United States, for the Southern District of New York.—Hutchinson, Pierce & Co. Complainant, *vs.* Joseph Loewy, Defendant.—Opinion, Hazel, *J.*—U. S. Circuit Court, Southern District, N. Y.—Filed Dec. 4, 1907.—John A. Shields, Clerk.

127 At a Stated Term of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit, held at the United States Court House and Post Office Building, in the City of New York, Borough of Manhattan, in said District, on the 13th day of January, 1908.

Present: Hon. John R. Hazel, Judge.

In Equity.

HUTCHINSON, PIERCE & Co., Complainant,
vs.
JOSEPH LOEWY, Defendant.

Final Decree.

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was

Ordered, adjudged and decreed, and the Court doth hereby order, adjudge and decree, that the bill of complaint in the above entitled cause be, and the same is, hereby dismissed with costs to the defendant to be taxed.

JOHN R. HAZEL, *U. S. J.*

(Endorsed:) United States Circuit Court, Southern District of New York.—Hutchinson, Pierce & Co., Complainant, *vs.* Joseph Loewy, Defendant.—Final Decree.—Notice of settlement of the within decree is waived. Archibald Cox, Sol. for Complt.—U. S. Circuit Court, Southern District of N. Y.—Filed Jan. 13, 1908.—John A. Shields, Clerk.

128 United States Circuit Court, Southern District of New York.

HUTCHINSON, PIERCE & Co., Complainant,
vs.
JOSEPH LOEWY, Defendant.

Assignment of Errors.

And now comes the complainant and says that in the record and proceedings of said Court in the above entitled cause, and in the final decree made and entered therein on the 13th day of January, 1908, there is manifest error, and for error the said complainant assigns the following:

1. The Court erred in basing its decision on matters not in issue.

2. The Court erred in failing to give effect to the rule that in the case of a technical trade-mark the fact of its use by another upon an article of the same class creates a cause of action.

3. The Court erred in holding that the use by the defendant of accessories in connection with the mark justified the use of complainant's trade-mark on defendant's good- and in his advertising.

4. The Court erred in holding that it was incumbent on the complainant to prove that "confusion of goods existed or that intending purchasers had been deceived in buying defendant's article for that of complainant."

129 5. The Court erred in not holding that the appropriation and impairment of complainant's property in its trade-mark should be restrained.

6. The Court erred in not restraining the use by the defendant of complainant's trade-mark.

7. The Court erred in not granting the relief prayed for in the bill of complaint.

8. The Court erred in dismissing the bill of complaint.

Dated January 18, 1908.

ARCHIBALD COX,
Solicitor for Complainant.

(Endorsed:) United States Circuit Court, Southern District of New York.—Hutchinson, Pierce & Co., Complainant, *vs.* Joseph Loew-, Defendant.—Assignment of Errors.—U. S. Circuit Court, Southern District of N. Y.—Filed Jan. 20, 1907.—John A. Shields, Clerk.

United States Circuit Court, Southern District of New York. In Equity.

HUTCHINSON, PIERCE & Co., Complainant,
vs.
JOSEPH LOEWY, Defendant.

Petition for Appeal.

The above named complainant, Hutchinson, Pierce & Co., conceiving itself aggrieved by the final decree filed and entered

130 in the office of the Clerk of this Court, on the 13th day of January, 1908, in the above entitled cause, does hereby appeal therefrom to the United States Circuit Court of Appeals for the Second Circuit, and prays that its appeal may be allowed and a citation granted, directed to the above named defendant, Joseph Loewy, commanding him to appear before the United States Circuit Court of Appeals for the Second Circuit, to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record, proceedings and evidence in said cause, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Second Circuit.

Dated New York City, January 18, 1908.

ARCHIBALD COX,
Solicitor for Complainant.

The complainant having given the proper security for costs, it is

Ordered, that the foregoing appeal be and the same is hereby allowed.

Dated January 20, 1908.

E. H. LACOMBE,
U. S. C. J.

(Endorsed:) United States Circuit Court, Southern District of New York.—Hutchinson, Pierce & Co., Complainant, *vs.* Joseph Loewy, Defendant.—Petition for Appeal, and Order Allowing same.—Due service of within Petition for Appeal and Order Allowing same admitted Jan. 21st, 1908, Ira Jay Dutton, Def't's solicitor.—Ira Jay Dutton, Def't's solicitor.—U. S. Circuit Court, Southern District of N. Y.—Filed Jan. 21, 1908.—John A. Shields, Clerk.

131 Federal Union Surety Company.

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

HUTCHINSON, PIERCE & Co., Complainant,
vs.
JOSEPH LOEWY, Defendant.

Bond for Damages and Costs.

Know all Men by these Presents, that the Federal Union Surety Company, a corporation organized under the laws of the State of Indiana, and having its principal office in the City of Indianapolis, Indiana, and lawfully transacting business in the State of New York, and having its principal office in said State at No. 1 Madison avenue, in the Borough of Manhattan, in the City of New York, is held and firmly bound unto the above named Joseph Loewy, in the sum of two hundred and fifty ($250.00) dollars, to be paid to the said Joseph Loewy, for the payment of which, well and truly to be made, it binds itself, its successors and assigns, jointly and severally, firmly by these presents. Sealed with its seal and dated the 20th day of January, in the year of our Lord one thousand nine hundred and eight.

Whereas, the above named Hutchinson, Pierce & Co. has prosecuted an appeal to the United States Circu-t Court of Appeals for the Second Circuit to reverse the decree rendered in the above entitled suit, by the Judge of the Circuit Court of the United States
132 for the Southern District of New York.

Now, therefore, the condition of this obligation is such that if the above named Hutchinson, Pierce & Co. shall prosecute its appeal to effect, and answer all damages and costs, if it fail to make said plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

FEDERAL UNION SURETY COMPANY,
[L. S.] By ROBERT M. NUGENT,
Resident Vice-President.

Attest:
E. B. HOXIE,
Resident Assistant Secretary.

Sealed and delivered and taken and acknowledged this 20th day of January, 1908, before me.

ESTHER BERG,
Notary Public, New York County.

Cert. filed in Kings, Queens, Suffolk, Richmond and Westchester Counties.

STATE OF NEW YORK,
County of New York, ss:

On this 20th day of January, 1908, before me personally appeared Robert M. Nugent, resident vice-president of the Federal Union Surety Company, with whom I am personally acquainted, who, being by me duly sworn, said: That he resides in the County of New York; that he is the resident vice-president of the Federal Union Surety Company, the corporation described in and which executed the foregoing bond; that he knows the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed by order of the Board of Directors of the said company, and that he signed said instrument as resident vice-president of said company by like authority, and that the liabilities of said company do not exceed its assets, as ascertained in the manner provided by law and confirmed by an order of
133 the Supreme Court of New York made and entered in New York County on March 30, 1904, and the said Robert M. Nugent further said that he is acquainted with E. B. Hoxie, and knows him to be the resident assistant secretary of said company; that the signature of said E. B. Hoxie, subscribed to the said instrument is in the genuine handwriting of the said E. B. Hoxie, and was thereto subscribed by the like order of the said Board of Directors, and in the presence of him, the said Robert M. Nugent, resident vice-president.

Robert M. Nugent, of New York City, N. Y., is attorney for service of process for the district in which this bond is given.

[L. S.] ESTHER BERG,
Notary Public, New York County.

Cert. filed in Kings, Queens, Suffolk, Richmond and Westchester Counties.

Copy of By-Law.

Be it Remembered, That at a meeting of the Board of Directors of the Federal Union Surety Company, duly called and held on the tenth day of July, 1901, a quorum being present, the following By-Law was adopted:

"Article VIII, SEC. 1. The President, Vice-President or Second "Vice-President may, from time to time, appoint Resident Vice-"Presidents, Resident Assistant Secretaries and Attorneys in fact, to "represent and act for and on behalf of the Company; and either the "President, Vice-President, Second Vice-President, the Board of "Directors or the Executive Committee may, at any time, remove

"any such Resident Vice-President, Resident Assistant Secretary, or "Attorney in Fact, and revoke the power and authority given "him.

134 "SEC. 3. *Resident Vice-Presidents.*—Resident Vice-Presi- "dents shall have power and authority to sign and execute on "behalf of the Company, any and all bonds, recognization, con- "tracts of indemnity, and other writings obligatory in the nature "thereof, and to bind the Company thereby as fully and to the same "extent as the President could bind it.

"SEC. 4. Resident Assistant Secretaries shall have power and au- "thority to affix the seal of the Company to, and attest on behalf of "the Company, any and all bonds recognizances, contracts of in- "demnity and other writings obligatory in the nature thereof as "fully and to the same extent as the Secretary could bind it."

STATE OF NEW YORK,
County of New York, ss:

I, E. B. Hoxie, resident assistant secretary of the Federal Union Surety Company, have compared the foregoing by-law with the original thereof as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original by-law.

Given under my hand and seal of the company, this 20th day of January, 1908.

[L. S.]

E. B. HOXIE,
Resident Assistant Secretary.

(Endorsed:) U. S. Circuit Court, Southern District of N. Y.—Filed Jan. — 1908—John A. Shields, Clerk—United States Circuit Court, Southern District of New York.—Hutchinson, Pierce & Co., Complainant, against Joseph Loewy, Defendant.—Copy.—Bond for Damages and Costs.—Surety: Federal Union Surety Company.—Approved as to form and also as to sufficiency of sureties, with reservation, however, to the Def't of the right at any time to examine the proper officers of the Surety Company, under oath touching its assets, liabilities and financial condition generally. E. H. Lacombe, U. S. Circuit Judge.

135 By the Honorable E. Henry Lacombe, one of the Judges of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

To Joseph Loewy, Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, on the 17th day of February, 1908, pursuant to an appeal filed in the Clerk's office of the Circuit Court of the United States for the Southern District of New York, wherein Hutchinson, Pierce & Co. is appellant, and you are appellee,

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to show cause, if any there be, why the final decree in said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 20th day of January, in the year of our Lord one thousand nine hundred and seven, and of the Independence of the United States the one hundred and thirty-second.

E. H. LACOMBE,
Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

(Endorsed:) United States Circuit Court of Appeals for the Second Circuit.—Hutchinson, Pierce & Co., Appellant, *vs.* Joseph Loewy, Appellee.—Citation.—Due service of within citation admitted Jan. 21st, 1908, Ira Jay Dutton, Def't's Solicitor.—U. S. Circuit Court, Southern District of N. Y.—Filed Jan. 21, 1908.—John A. Shields, Clerk.

136 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, do hereby certify that the foregoing pages numbered from — to — inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause entitled Hutchinson, Pierce & Company, complainant-appellant, against Joseph Loewy, defendant-appellee, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 5th day of February, in the year of our Lord one thousand nine hundred and eight, and of the Independence of the said United States the one hundred and thirty-second.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

137 United States Circuit Court of Appeals for the Second Circuit, October Term, 1907.

Argued April 8, 1908; Decided May 5, 1908.

No. 237.

HUTCHINSON, PIERCE & COMPANY, Complainants-Appellants,
vs.
JOSEPH LOEWY, Defendant-Appellee.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Before Judges Lacombe, Ward and Noyes.

WARD, *Circuit Judge:*

This is an action in equity for an injunction, an accounting of profits and damages, the complainant alleging that the defendant has infringed its technical trade-mark applied to shirts and has also been guilty of unfair competition. As the complainant is a corporation of the State of New York and the defendant is a citizen of the same state, the court's jurisdiction extends only to the use of the registered trademark in commerce between the states, with foreign nations and the Indian tribes.

There is no testimony showing that the defendant has passed off or intended to pass off his goods for the complainant's or that the defendant has made profits or the complainant sustained damage. Such an intention and such consequences are quite immaterial inasmuch as the cause proceeds solely upon the complainant's
138 ownership of its technical trademark. If the defendant infringes it, the injunction should issue regardless of his intention or of the consequence. *Lawrence Manufacturing Co.* v. *Tennessee Manufacturing Co.*, (138 *U. S.* 537); *Gannert* v. *Rupert*, (127 *F. R.* 962.)

The complainant has registered in the U. S. Patent Office as its trademark used for more than ten years theretofore in commerce among the several states the word "Star" and the outline of a six-pointed star either singly or together, as follows:

STAR

The defendant uses as its trademark on its shirts a comet consisting of a five-pointed solid star with a nebulous tail, together with the words "The Comet" as follows:

These two trademarks are obviously not identical and the defendant cannot be said to have literally appropriated the complainant's property. And not using the identical mark he cannot be said to have appropriated the complainant's property unless he uses something so like it as to be readily taken for it. But the complainant claims that it is entitled to an exclusive property in the word and symbol "Star" as applied to shirts whether they are used alone or in combination with other words and symbols.

A comet is defined in the Standard Dictionary as "A heavenly body consisting of a coma surrounding a bright star-like
139 nucleus with a nebulous tail or train, often of great length."

The head of the comet in the defendant's trademark is a solid five-pointed star, but we do not think his trademark sufficiently resembles the complainant's to be mistaken for it or to cause confusion or to deceive purchasers, which is the test prescribed as to registration in Section 5 of the Trademark Act of February 20, 1905.

The complainant relies upon the case of *Hutchinson* v. *Blumberg*, (51 *F. R.* 829) as showing that a star cannot be applied as a trademark to shirts even in combination with other symbols, as, for example, a crescent. But this was a case of unfair competition and the court found that the defendant gave such prominence both to the word and symbol "Star" as to deceive purchasers and cause them to think they were buying complainant's "Star" shirts. Judge Blodgett said nothing to indicate that an injunction should issue as against a trademark so little like complainant's as is the defendant's in this case where complainant relies solely upon the property right in the trademark.

The decree is affirmed with costs.

Archibald Cox, for the Appellants.
E. T. Fenwick, for the Appellee.

140 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 15th day of May, one thousand nine hundred and eight.

Present: Hon. E. Henry Lacombe, Hon. Henry G. Ward, Hon. Walter C. Noyes, Circuit Judges.

HUTCHINSON, PIERCE & COMPANY, Complainants-Appellanys,
vs.
JOSEPH LOEWY, Defendant-Appellee.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said Circuit Court be and it hereby is affirmed with costs.

W. C. N.

It is further ordered that a Mandate issue to the said Circuit Court in accordance with this decree.

141 Endorsed: United States Circuit Court of Appeals, Second Circuit. Hutchinson, Pierce & Co. vs. J. Loewy. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed May 15, 1908. William Parkin, Clerk.

142 United States Circuit Court of Appeals for the Second Circuit.

HUTCHINSON, PIERCE & CO., Complainant and Appellant,
vs.
JOSEPH LOEWY, Defendant and Appellee.

Petition for Appeal.

The appeal of the above named complainant and appellant, Hutchinson, Pierce & Co., respectfully shows:

The bill of complaint in this cause was filed on the 14th day of May, 1906, to restrain the defendant herein from infringing upon the complainant's trade-mark by it registered on the 3d day of April, 1906, in pursuance of an Act of Congress, Approved February 20, 1905, entitled "An Act to authorize the registration of trade-marks used in commerce with foreign nations or among the several states or with Indian Tribes, and to protect the same," to which bill the said defendant, on the 2nd day of July, 1906, filed an answer, and thereafter the complainant filed a general replication.

This cause thereupon came on for final hearing before the United States Circuit Court for the Southern District of New York upon the

pleadings and proofs, and counsel for the respective parties having been duly heard, the Court rendered its decision, and a final decree was, on the 13th day of January, 1908, made dismissing the said bill of complaint upon the merits, with costs to the defendant, which decree was filed and entered in this cause in the office of the
143 Clerk of said Court on the 13th day of January, 1908.

On the 20th day of January, 1908, the appeal of the above named complainant to the United States Circuit Court of Appeals for the Second Circuit from said final decree of the Circuit Court of the United States for the Southern District of New York was allowed and a citation issued to the defendant herein.

The said appeal came on for argument before the United States Circuit Court of Appeals for the Second Circuit, and after hearing counsel for the respective parties the Court rendered its decision, and an order and decree affirming the said final decree of the said United States Circuit Court for the Southern District of New York was on the 15th day of May, 1908, made by the said United States Circuit Court of Appeals for the Second Circuit, which was duly entered in this cause in the office of the Clerk of said Court.

Wherefore the above named complainant and appellant, conceiving itself aggrieved by the decision, order, and decree of the said United States Circuit Court of Appeals for the Second Circuit, dated the 15th day of May, 1908, made in the above entitled cause, does hereby appeal therefrom to the Supreme Court of the United States, and it prays that its appeal may be allowed and a citation granted, directed to the above named defendant and appellee, commanding him to appear before the Supreme Court of the United States to do and receive what may appertain to justice to be done in the
144 premises, and that a transcript of the record, proceedings and evidence in said cause, duly authenticated, may be sent to the Supreme Court of the United States.

Dated, New York City, N. Y., June 16, 1908.

ARCHIBALD COX,
Solicitor and Counsel for Complainant and Appellant.

The complainant and appellant having filed the necessary security for costs, it is—

Ordered that the foregoing appeal be, and the same is hereby, allowed.

Dated, New York City, N. Y., June 17, 1908.

(S'gn'd) E. H. LACOMBE,
U. S. Circuit Judge.

145 Endorsed: U. S. Circuit Court of Appeals, for the Second Circuit. Hutchinson, Pierce & Co., Compl't and Appellant, vs. Joseph Loewy, Defendant and Appellee. Petition for Appeal and Order Allowing Same. Archibald Cox, Counsel for Compl't-App'l't, 229 Broadway (Bor. of Man.), New York City, N. Y. United States Circuit Court of Appeals, Second Circuit. Filed Jun-17, 1908. William Parkin, Clerk.

146 Copy.

Federal Union Surety Company.

United States Circuit Court of Appeals for the Second Circuit.

HUTCHINSON, PIERCE & COMPANY, Complainant and Appellant,
vs.
JOSEPH LOEWY, Defendant and Appellee.

Bond for Damages and Costs.

Know all men by these presents, That the Federal Union Surety Company, a corporation organized under the laws of the State of Indiana and having its principal office in the City of Indianapolis, Indiana, and lawfully transacting business in the State of New York, and having its principal office in said State at No. 1 Madison Avenue, in the Borough of Manhattan, in the City of New York, is held and firmly bound unto the above named Joseph Loewy in the sum of Two hundred and fifty ($250.00) dollars, to be paid to the said Joseph Loewy for the payment of which well and truly to be made, it binds itself, its successors and assigns, jointly and severally, firmly by these presents. Sealed with its seal, and dated the 15th day of June, in the year of our Lord one thousand nine hundred and eight.

Whereas, the above named Hutchinson, Pierce & Company has prosecuted an appeal to the United States Supreme Court to reverse the final Order, Decision and Decree rendered in the above entitled suit, by the Judge of the United States Circuit Court of Appeals for the Second Circuit.

Now, therefore, the condition of this obligation is such, that if the above named Hutchinson, Pierce & Company shall prosecute said Appeal to effect, and answer all damages and costs if it shall fail to make its plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

FEDERAL UNION SURETY COMPANY,
By ROBERT M. NUGENT,
Resident Vice-President.

Attest:
E. B. HOXIE,
Resident Assistant Secretary.

Sealed and delivered, and taken and acknowledged this 15th day of June, 1908, before me,

[L. S.] GERTRUDE M. MACDONALD,
Notary Public, New York County.

Cert. filed in Kings, Queens, Suffolk, Richmond & Westchester Counties.

147 STATE OF NEW YORK,
County of New York, ss:

On this 15th day of June, 1908, before me personally appeared Robert M. Nugent, Resident Vice President of the Federal Union Surety Company, with whom I am personally acquainted, who, being by me duly sworn, said that he resides in the County of New York, that he is the Resident Vice President of the Federal Union Surety Company, the corporation described in and which executed the foregoing bond; that he knows the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed by order of the Board of Directors of the said company, and that he signed said instrument as Resident Vice President of said company by like authority; and that the liabilities of said company do not exceed its assets, as ascertained in the manner provided by law and confirmed by an order of the Supreme Court of New York made and entered in New York County on March 30, 1904. And the said Robert M. Nugent, further said that he is acquainted with E. B. Hoxie, and knows him to be the Resident Assistant Secretary of said company; that the signature of said E. B. Hoxie, subscribed to the said instrument is in the genuine handwriting of the said E. B. Hoxie, and was thereto subscribed by the like order of the said Board of Directors, and in the presence of him, the said Robert M. Nugent, Resident Vice-President.

GERTRUDE M. MACDONALD,
Notary Public, New York County.

Cert. filed in Kings, Queens, Suffolk, Richmond & Westchester Counties.

Copy of By-Law.

Be it Remembered, That at a meeting of the Board of Directors of the Federal Union Surety Company, duly called and held on the tenth day of July, 1901, a quorum being present, the following By-Law was adopted:

"ARTICLE VIII, SEC. 1. The President, Vice-President, or Second "Vice-President may, from time to time, appoint Resident Vice-"Presidents, Resident Assistant Secretaries and Attorneys in fact, "to represent and act for, and on behalf of the Company; and either "the President, Vice-President, Second Vice-President, the Board of "Directors or the Executive Committee may, at any time, remove "any such Resident Vice-President, Resident Assistant Secretary, or "Attorney in Fact, and revoke the power and authority given him.

"SEC. 3.—*Resident Vice-Presidents.* Resident Vice-Presidents shall "have power and authority to sign and execute on behalf of the "Company, any and all bonds, recognization, contracts of indemnity "and other writings obligatory in the nature thereof, and to bind "the Company thereby as fully and to the same extent as the Presi-"dent could bind it."

"SEC. 4.—Resident Assistant Secretaries shall have power and "authority to affix the seal of the Company to, and attest on behalf "of the Company, any and all bonds recognizances, contracts of

"indemnity and other writings obligatory in the nature thereof as "fully and to the same extent as the Secretary could bind it."

(Endorsed:) United States Circuit Court of Appeals for the Second Circuit. Hutchinson, Pierce & Company, Complainant and Appellant, against Joseph Loewy, Defendant and Appellee. Copy. Bond for damages and costs. Surety: Federal Union Surety Company. I approve of the within bond, and of the sufficiency of the surety. (Sgnd.) E. H. Lacombe, U. S. C. J. United States Circuit Court of Appeals, Second Circuit. Filed June 17, 1908. William Parkin, clerk.

STATE OF NEW YORK,
County of New York, ss:

I, E. B. Hoxie, Resident Assistant Secretary of the Federal Union Surety Company, have compared the foregoing By-Law with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original By-Law.

Given under my hand and seal of the Company, this 15th day of June, 1908.

[L. S.] E. B. HOXIE,
Resident Assistant Secretary.

148 United States Circuit Court of Appeals for the Second Circuit.

HUTCHINSON, PIERCE & Co., Complainant and Appellant,
vs.
JOSEPH LOWEY, Defendant and Appellee.

Assignment of Errors.

And now comes the Complainant and Appellant and says that in the record and proceedings of the said Court in the above entitled cause and in the decision, order and decree made and entered therein on the 15th day of May, 1908, there is manifest error, and for error the said Complainant and Appellant assigns the following:

1. The Court erred in not holding that the complainant being the owner of a trade-mark for shirts, consisting of a star (whether verbally or pictorially expressed), and having duly registered the same under the Act of Congress, was entitled to an injunction restraining the unauthorized use by the defendant of a reproduction, counterfeit, copy, or colorable imitation, of such trade-mark, to wit, a star, regardless of dots or words or other matter accompanying it, upon or in connection with the sale of merchandise of substantially the same descriptive properties.

2. The Court erred in holding that the complainant had
149 registered a six pointed star and in not holding that the complainant owned and had registered as its trade-mark a star broadly, whether expressed pictorially or verbally.

3. The Court erred in basing its decision on the test prescribed as to registration by Section 5 of the Act of Congress of February 20, 1905, and in not applying the test prescribed as to infringement by Section 16 of said Act.

4. The Court erred in not granting an order and decree for mandate directing the Circuit Court of the United States for the Southern District of New York to vacate the final decree entered therein on the 13th day of January, 1908, and directing that a decree be entered therein granting the complainant the relief prayed for in the bill.

5. The Court erred in entering an order and decree for mandate affirming the final decree of the Circuit Court of the United States for the Southern District of New York, entered therein on the 13th day of January, 1908.

Dated, June 16th, 1908.

ARCHIBALD COX,
Solicitor and Counsel for Complainant and Appellant.

150 (Endorsed:) U. S. Circuit Court of Appeals for the Second Circuit. Hutchinson, Pierce & Co., Compl't and Appellant, vs. Joseph Loewy, Defendant and Appellee. Assignment of Errors. United States Circuit Court of Appeals, Second Circuit. Filed Jun-17, 1908. William Parkin, Clerk.

151 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 150 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Hutchinson, Pierce & Company against Joseph Loewy, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 18th day of June in the year of our Lord One Thousand Nine Hundred and Eight and of the Independence of the said United States the One Hundred and thirty-second.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

152 By the Hon. E. Henry Lacombe, one of the Judges of United States Circuit Court of Appeals for the Second Circuit, to Joseph Loewy:

Whereas, Hutchinson, Pierce & Co., has lately appealed to the Supreme Court of the United States from a decision, order, and decree lately rendered in the United States Circuit Court of Appeals for the Second Circuit, made in favor of you, the said Joseph Loewy, and has filed the security required by law, you are therefore cited to

appear before the said Supreme Court of the United States, at the City of Washington, in the District of Columbia, on the 17th day of July, 1908, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the City of New York, in the Southern District of New York, in the Second Circuit, on the 17th day of June, in the year of our Lord one thousand nine hundred and eight.

E. H. LACOMBE,
U. S. Circuit Judge.

Service of a copy of the foregoing citation admitted June 18th, 1908.

IRA JAY SUTTON,
Solicitor and Counsel for Defendant and Appellee.

153 [Endorsed:] U. S. Circuit Court of Appeals for the Second Circuit. Hutchinson, Pierce & Co., Compl't and Appellant, vs. Joseph Loewy, Defendant and Appellee. Citation. United States Circuit Court of Appeals, Second Circuit. Filed Jun- 18, 1908. William Parkin, Clerk.

Endorsed on cover: File No. 21,234. U. S. Circuit Court Appeals, 2d Circuit. Term No. 182. Hutchinson, Pierce & Co., appellant, vs. Joseph Loewy. Filed June 23d, 1908. File No. 21,234.